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LEADING ARTICLES

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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR ASSOCIATION

Vol. III

FEBRUARY, 1931

No. 3

A NEW LEGAL CLASSIFICATION IN MISSISSIPPI JURISPRUDENCE

By WILLIAM H WATKINS*

The discovery and production of gas in the State of Mississippi in commercial quantity presents a new field of legal research. This is virgin territory, so far as the State of Mississippi is concerned.

The law pertaining to oil and gas is classified under present digesting systems under the classification of mines and minerals. An examination of the Mississippi Digest reveals no decision by the Supreme Court of the State of Mississippi dealing with the subject-matter. *Emerson vs. Jordan*, 92 So. 689, 129 Miss. 598, involved purely mineral rights; the case of *Board of Supervisors of Hancock County vs. Imperial Naval Stores*, 47 So. 177, 93 Miss. 822, presented the question as to the taxability of a turpentine lease.

It may, therefore, be expected that the many intricate legal questions found in the States where oil and gas have heretofore existed will present themselves before the courts of Mississippi. Some of the most important will not involve a construction of a Mississippi statute, but will require the adoption and application of established principles to a new state of facts. In other words, in the main the questions will depend for their determination not upon the construction of a statute, but what Judge Cordoza calls "judicial brew."

The courts of last resort in other States are in direct conflict as to the application of the legal principles involved and the final conclusions announced. Notwithstanding this may be true, members of the legal profession consulted in respect to legal rights of their clients will be expected to know what the law is with respect to any controversy which may arise. If you were to ask a farmer today how many bales

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of cotton he will harvest, gin and market in the present year he would of necessity tell you that many things would have to be taken into consideration—the question of fertilizers, soils, climate, labor, and other factors dealing with the production of cotton. So, many factors enter into the decision which may finally be given by the courts of the State of Mississippi to the various controversies which may be presented. No lawyer, then, can give a final opinion as to many of the questions which will be presented. The decision will turn upon the view the courts of Mississippi may take of conflicting judicial precedents from other States. That this is true is one of the things which the average layman cannot understand about the law; he thinks that the lawyer ought to be able off-hand—certainly with some investigation—to tell him exactly what the court will decide in respect to each controversy. Judge Frank Jerome, in his recent book “Law and the Modern Mind,” calls this the “Basic Myth”; and the fact that the lawyer is unable with certainty to advise his client in respect to each and every controverted question which may arise, occasions that disfavor with which the lawyer is very largely viewed.

Speaking of the wide-spread criticism of the profession, the author says:

“What lies back of this popular criticism? It appears to be founded on a belief that the lawyers complicate the law, and complicate it wantonly and unnecessarily, that, if the legal profession did not interpose its craftiness and guile, the law could be clear, exact and certain. The layman thinks that it would be possible so to revise the law books that they would become something like logarithm tables, that the lawyers could, if only they would, contrive some kind of legal slide-rule for finding exact legal answers. Public opinion agrees with Napoleon who was sure that ‘it would be possible to reduce laws to simple geometrical demonstrations, so that whoever could read and tie two ideas together would be capable of pronouncing on them.’

“But the law as we have it is uncertain, indefinite, subject to incalculable changes. This condition the public ascribes to the men of law; the average person considers either that lawyers are grossly negligent or that they are guilty of malpractice, venally obscuring simple legal truths in order to foment needless litigation, engaging in a guild conspiracy of distortion and obfuscation in the interest of larger fees.

“Now it must be conceded that, if the law can be made certain and invariable, the lawyers are grievously at fault. For the layman is justified in his opinion that the co-efficient of legal uncertainty is unquestionably large, that to predict the decisions of the courts on many a point is impossible. Any competent lawyer,

during any rainy Sunday afternoon, could prepare a list of hundreds of comparatively simple legal questions to which any other equally competent lawyer would scarcely venture to give unequivocal answers."

It may be said, however, with certainty that gas situated beneath the surface of the earth is an incident to the land and, like timber growing upon the land or minerals beneath the surface, such rights thereto as are transferable from one person to another pass with a conveyance of the land. *Hand vs. Fillingane*, 92 Miss. 185, 45 So. 569. The right to drill for and take gas from beneath the surface of the land is a covenant running with the land, and may be termed an "incorporeal hereditament," or, in other words, "incorporeal real property."

In *Thornton on Oil and Gas*, Vol. 1, Par. 19, the following rule is announced:

"Oil and gas, until severed from the realty, are as much a part of it as coal or stone. So long as they remain in the ground, outside of an artificial receptacle, at least, as the casing of a well or a pipe line, they must be treated as a part of the realty underneath the surface of which they lie. So much so are they a part of the realty, as we shall repeatedly see hereafter, that a conveyance of them in their natural state in the earth requires all the formalities of a conveyance of any other interest in the same real estate. A reservation of 'all mines, minerals and metals in and under' a tract of land is a reservation of the oil and gas."

Also, on page 75 the following rule is announced:

"A deed that conveys the fee conveys the oil, gas and minerals under the surface; and oral evidence is not admissible to show that oil, gas and minerals were not conveyed."

Gas situated below the surface of the earth is a fugitive substance; the owner of the land may drill thereupon and extract the gas therefrom. If he fails to do so, however, the owner of an adjoining tract of land, by drilling upon his own property, may remove the gas from the land of his neighbor without liability therefor. This being true, a very interesting question has been presented in other States, and will doubtless become the subject of controversy in the State of Mississippi, as to whether or not the owner of the soil owns the gas beneath the surface of the ground, provided he captures the same before the owner of adjoining land may do so. In other words, before taking the same does the owner of the land own the title to the gas, or does he merely own the right to drill thereupon for gas and become invested only with the legal title thereto after the same is captured? There is well nigh a hopeless conflict of authorities upon this question. The determination

thereof depends upon no statute, but the application of legal principles by the courts of the State in which the land is situated. The question is not one of Federal law; upon the other hand, the United States Court would be bound by the decision of the State court of last resort in respect thereto. *Edward Hines Yellow Pine Trustees vs. Martin*, 268 U. S. 458, 69 L. Ed. 105.

The question came before the Supreme Court of the United States in the case of *Brown vs. Spilman*, 155 U. S. 665, 39 L. Ed. 304. The case was tried in the State of West Virginia, and the Federal Court was, therefore, bound by West Virginia decisions upon the subject-matter. The Supreme Court of the State of West Virginia was one of the courts holding that the owner of the land had the legal title to gas beneath the surface, provided the same was captured by him, but that, in the meantime, the owner of the land was the proprietor of the gas. The Court used the following language:

"It may be well to make some preliminary observations on the subject-matter of this contract, and thus facilitate the task of its construction.

"The subject of the grant was not the land, certainly not the surface. All of that except the portions actually necessary for operating purposes and the easement of ingress and egress, was expressly reserved to Taylor. The real subject of the grant was the gas and oil contained in or obtainable through the land, or rather the right to take possession of the gas and oil by mining and boring for the same.

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown vs. Vandergrift*, 80 Pa. 147; *Westmoreland & C. Nat. Gas Co.'s App.*, 130 Pa. 235."

The contrary view, however, is that of the State of Indiana as announced by its courts. The question was presented in the Supreme Court of the United States, *Ohio Oil Co. vs. Indiana*, 177 U. S. 190, 44 L. Ed. 729. The Supreme Court of Indiana had held in numerous decisions that the owner of the land did not have title to the gas beneath the surface until after he captured it, but has, as an incident to the ownership of the land, the exclusive right to

drill upon such land for gas. The Court used the following language:

"The proposition, then, which denies the power in the State to regulate by law the manner in which the gas and oil may be appropriated, and thus prevent their destruction, of necessity involves the assertion that there can be no right of ownership in and to the oil and gas before the same have been actually appropriated by being brought into the possession of some particular person. But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property. The whole contention, therefore, comes to this: That property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken was not property, and could not, therefore, be brought within the guaranties ordained for the proper protection of property."

The court held that while the owner of land did not own the gas as placed under the land, and only got title to the gas after the same was captured, the right to take the gas was an incident to the ownership of the land, in that only the owner of the land could drill a well thereupon. The Court used the following language:

"No one owner of the surface of the earth, within the area beneath which the gas and oil move can exercise his right to extract from the common reservoir, in which the supply is held, without to an extent diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his rights of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character they are yet one, because they are unitedly held in the place of deposit. In *Brown vs. Spilman*, 155 U. S. 665, 669, 670, 39 L. Ed. 304, 305, 15 Sup. Ct. Rep. 245, 247, these distinctive features of deposits of gas and oil were remarked upon. The Court said:

" 'Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.' *Brown vs. Vandergrift*, 80 Pa. 142, 147; *Westmoreland & C. Nat. Gas. Co. vs. DeWitt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724."

The Court also used the following language:

"Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the State of Indiana to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

"If the analogy between animals *ferae naturae* and mineral deposits of oil and gas stated by the Pennsylvania courts and adopted by the Indiana court, instead of simply establishing a similarity of relation proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the 'negative community'; in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid their future taking. *Geer vs. Connecticut*, 161 U. S. 519, 525, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is no identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the law-maker may exercise as to the two."

All authorities appear to agree, however, that the right to take gas from beneath the surface of the land is real estate; that is to say, an incident to the ownership of the fee, and passes by conveyance thereof. *Frost Johnson Lbr. Co. vs. Salling*, (La.) 91 So. 207; *Handy vs. Texas Co.*, 140 La. 194; 72 So. 933; *Emerson vs. Little Six Oil Co.*, C. C. A. (5th) 3 Fed. (2d) 265; *U. S. vs. Looney*, C. C. A. (5th) 29 Fed. (2d) 884.

The foregoing is only one of the many interesting and important legal questions involving the substantial rights of persons in the State of Mississippi.

TORT LIABILITY OF INSURANCE COMPANIES

By R. C. STOVALL*

It is with hesitancy the writer undertakes an article dealing with the liability of insurance companies in tort. In the February, 1930, issue of the Mississippi Law Journal there appeared an article by Honorable W. Calvin Wells on this subject, presenting in a very forceful manner the reasons why an insurance company should not be held responsible for its negligence and that of its agents in not promptly forwarding applications for insurance, or for delay of the company in passing upon such applications, or for delay in forwarding and delivering policies after issuance within a reasonable time.¹ Paramount consideration was given in an endeavor to justify the conclusion of the Supreme Court of Mississippi in *Savage, Admr., etc. vs. Prudential Life Insurance Company of America, et al.*, 121 So. 487, as representing the weight of authority and better reasoning of such cases. The writer in taking a contrary view does so with great deference to the ability of Mr. Wells and the learning of the Supreme Court of Mississippi. It seems that two major questions are raised against holding an insurance company liable in tort when its agent, who solicits an application of insurance, fails to transmit it promptly to the home office, or its local medical examiner fails to transmit promptly the report of his examination, or the home office fails to pass upon such application of insurance within a reasonable time, and fails to deliver the policy when issued or notify the applicant within a reasonable time of the acceptance or rejection of his application.

The first obstacle is the elementary theory of a contract that there must be a meeting of the minds of the parties upon a particular subject matter has not been complied with. Second, that legislative action is necessary to impose a duty upon the insurance company to use diligence under such circumstances and to hold otherwise would constitute Judicial Legislation, and therefore against public policy and contrary to the function of the court.

It is recognized as sound law that where a person makes an offer, the offeree must accept it upon the terms stated, otherwise no contractual obligation exists; and further,

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¹ Mississippi Law Journal, Vol. 2, page 293.

that the delay of the offeree in accepting the offer or failing to either accept or reject the offer will not create a contract, but it is a non-sequitur to hold that an action in tort may not arise in a case where an action *ex contractu* cannot be sustained. To determine whether any duty is owed by an insurance company to an applicant for insurance it must first be decided whether the insurance business is affected with a public interest, and, it is submitted, that such business does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.² And where an operator of a given business holds himself out to render a service of a public character and of public consequence and concern, such as the insurance business, then such business may safely be said to be affected with a public interest and comparable to that of a public utility.

Confusion has arisen because of the court's failure to distinguish complaints against insurance companies in assumpsit or actions *ex contractu* when the proof was such as to sustain an action, if properly pleaded, *ex delicto*.³ It is a primary and elementary principle that a party can succeed in an action at law only on the case made by the pleadings. Proofs, to be effectual, must correspond substantially with the allegations of the pleading. A party must succeed, if at all, upon the claim set up in his declaration. Proof without allegation is as unavailing as allegation without proof. A party cannot set up one cause of action and succeed upon proof of another and different cause of action not pleaded.⁴

It is recognized by the Supreme Court of Mississippi in *Savage vs. Prudential Insurance Company of America et al.*, supra, as well as in most other States of the Union, that the business of insurance is affected with a public interest;⁵ that a regulation of such business by statute which requires prompt action by insurance companies in passing upon applications for insurance does not violate the fourteenth amendment to the federal constitution. It is submitted upon reason and authority that if the legislature, under the police power reserved to it by the federal constitution,

² *Munn vs. Illinois*, 94 U. S. 113, 24 Law Ed. 77.

³ *Northern Neck Mutual, etc. vs. Turlington*, 116 S. E. 363; *Northwestern Mutual Life Ins. Co. vs. Neafus*, 145 Ky. 563, 140 S. W. 1026; *National Union Ins. Co. vs. School District*, 182 S. W. (Ark.) 547; *Musselhorn vs. Mutual Reserve*, 30 Fed. 554.

⁴ 49 C. J. 804, Sec. 1187.

⁵ *N. W. Natl. Life Ins. Co. vs. Riggs*, 203 U. S. 243; *Natl. Fire Ins. Co. vs. Wanberg*, 260 U. S. 71.

can regulate insurance companies to the extent of prescribing contractual relations⁶ and invalidating certain elements of the contracts such as the exclusion of the defense of suicide,⁷ then the courts are acting properly within their sphere in determining whether or not concrete controversies between a business affected with a public interest and an individual dealing with such business organization, to-wit, Insurance Company, there is a duty imposed upon such organization to use diligence and due care in the performance of its business.

There are three Mississippi cases quoted from by Mr. Wells and referred to by the Supreme Court of Mississippi in the Savage case as sustaining the proposition that under the circumstances set out in the subject of this paper no liability exists against an insurance company for negligence. They are *Jacobs vs. Insurance Company*, 71 Miss. 658; *Insurance Company vs. McIntosh*, 86 Miss. 236; and *Newark Insurance Company vs. Russell*, 107 So. 714. There can be no criticism of the holding of the court in those cases for the declaration was founded solely on contract. These cases are similar to those of other jurisdictions denying recovery where the action sounded in contract though the proof established negligence on the part of the insurance company in passing upon the application or delivering the policy and the loss occurred before a completion of the contract.⁸ In reaching its conclusion in the Jacob case the court said: "There is no escape from the plain stipulation of the contract," and in the McIntosh case the court said: "he died before he had an opportunity to determine whether he would accept it (referring to a policy written different from the one applied for); thus it is perfectly evident that the minds of the parties never met and that no contract of insurance was ever effected," and in the Russell case the court uses this language: "but whether we treat the suit as one upon a written contract of insurance or upon an oral contract can make no difference so far as the result of this case is concerned, because the conclusion we have reached will end the case in either event." The question is: "whether or not there was in fact a contract of insurance entered into between the parties?"

The Supreme Court of Mississippi in the Savage case stated: "We are unable to see how an action may be main-

⁶ *Wanberg vs. National Union Fire Ins. Co.*, 67 Law Ed. 139.

⁷ *Whitfield vs. Aetna Life Ins. Co.*, 51 Law Ed. 891.

⁸ *Ins. Co. vs. Mayes*, 61 Ala. 163; *Ins. Co. vs. Neafus*, 145 Ky. 563, 140 S. W. 1026.

tained in tort which so clearly cannot be maintained on any theory in the contract. The Prudential Life Insurance Company was under no duty to write insurance on the life of the appellant's intestate because there is no statute in this State fixing such duty upon insurance companies. We can find no such rule in the Common Law. It is quite elementary that it cannot be a tort without a breach of a legal duty. It is true that the business of insurance is affected with a public interest." Just what the court had in mind when it refused to predicate liability because it could find "no rule at the Common Law" it is difficult to understand. Not only what is the law but our conception of what law is of necessity changes with time. What is often referred to as the Common Law had its source in the very early judgments of the English Courts in pronouncing their views upon concrete controversies or in a recognition of some custom or usage that in the mind of the individual judge was for the best interest of society. Students of the law would not consider the term "The Common Law" as the embodiment of an ancient code or the result of judicial decisions drawn by some superhuman wisdom in the dim past. As stated by Geldart: "I doubt if Blackstone, should he suddenly visit the courts which have taken the place of those he knew, could understand enough of their law and procedure to do more than feel occasionally shocked." If judicial decision does not, in the present day, make the Common Law, or, as expressed by Professor Williston, "Unwritten Law," then we must say that law pre-exists judicial decision and assume the eternal self sufficiency of the existing law. But as stated by Mr. Cohen: "If the identity of the Common Law since Littleton, Coke or Blackstone, is to be maintained at all, it is not as a collection of substantive rules but rather as a mode of judicial thinking or as a method of law making." "Life is continually developing new and unforeseeable situations uncovered by precedent. Judges are obliged to decide every case before them (these decisions serving as binding precedents). It follows that they must, in the course of their work, develop new rules." The flimsy fiction that judicial decisions do not make the law but are only the evidence of it is inconsistent with the doctrine of "stare decisis." If decisions were only evidence of the law why could not courts of inferior jurisdiction entertain evidence that any previous decisions or judgments were wrong? Obviously, to the extent that such evidence is excluded the past decisions have made law.

The anonymous and fictional character of the "Fellow Servant Rule" and the doctrine of "Assumption of Risk" are creatures of judicial legislation. The law of negligence consists principally of various standards of conduct set up by the courts to which people must conform at their peril. The right of action for Malicious Prosecution and for False Arrest does not have its inception is legislative fiat but by judicial decision. The outstanding instance of judicial legislation is the creation of modern mercantile law by Lord Mansfield out of long established customs of merchants. And again, the application of the law of Common Carriers to that of telephone companies and public utilities is nothing but judicial legislation arrived at by the desire of the particular judge to reach what, in his mind, is a right conclusion, and at the same time be supported by precedent, and as stated by Dean Wigmore: "A judge may decide almost any question any way and still be supported by an array of cases." However, Chief Justice Marshall seldom cited precedent to sustain his decisions, yet no one will say his interpretation of the constitution was not judicial legislation and, at the same time, such legislation that excels any that might have been enacted by Congress. When we view the great mass of equity rules and doctrines that have been evolved by the courts to lessen the rigors of what was called the Common Law, and which is now administered in most States by the same court but in Mississippi by a separate tribunal we are forced to admit that there are laws made by judicial legislation and that they are far more workable than if such laws or principles of equity had been prescribed by our legislatures. Even though our legislatures pass laws, in the final analysis, when the courts "construe" them to determine their meaning if ambiguous, or interpret them to determine whether certain elements should be supplied to reach a fitting result or their validity under constitutional grant, judicial legislation is the result, which, it is submitted, is a wholesome one. As stated by Mr. Cohen: "It is more reasonable to suppose that the minds of most judges work like those of other mortals; that is, having in various ways been unconsciously determined to decide one way or another, they look for and find reasons or precedents for such decisions."

To concur with Mr. Wells' argument that tort liability against an insurance company is unsound in principle and illogical and unreasonable because it is purely and solely judicial legislation would be, in the words of Dean Pound, "a resistance to rational improvement," and a denial of any

confidence in the judiciary to determine controversies between members of society in the light of existing conditions and, according to Dean Pound, "judicial refusal to walk in new paths should be averted."

Before the legislature could enact a valid statute giving a right of action to an applicant for insurance where the company had been guilty of negligence in handling the application and in delivering the policies, etc., it would first have to be determined that the insurance business was affected with a public interest. No citation of authority is necessary to sustain the proposition that legislative fiat cannot convert a private business into a public one, and the only effect that legislative action would have would be merely evidentiary and not conclusive because the question in its last analysis is a judicial one. In other words, a statute giving a right of action by an applicant against an insurance company under the circumstances set out in the subject of this article would be no more than declaratory of the Common Law.

At this point it must be noted that it is not contended that an applicant for life insurance who is not, under any circumstances, a suitable risk has a cause of action against an insurance company for negligence for the status of such complainant would be that of "injuria absque damno." But it is submitted that, by the weight of authority, a person that is a suitable risk, though on terms different from that applied for, does have a right of action against an insurance company for negligence in handling the application or the policies whereby loss is sustained prior to the actual delivery of the policies, and such action in the case of life insurance may be maintained by the administrator of the estate of the deceased applicant.

The Supreme Court of Alabama in *Lewis vs. Brotherhood of Locomotive Firemen and Enginemen*, 124 So. 889, declined to follow the holding in *Savage vs. Prudential Life Insurance Co.*, and held that plaintiff had a right of action against defendant insurance company for the negligence of the local secretary of such company in transferring papers whereby the plaintiff was injured prior to the issuance of the policy. This case at the same time distinguished that of *Insurance Company vs. Mayes*, 61 Ala. 163, cited by Mr. Wells. The distinction is made because one is an action ex delicto and the other ex contractu. In the recent case of *Behanke et al. vs. Insurance Company*, 41 Fed. 2nd 696, decided on the 6th of June, 1930, the Circuit Court of Appeals for the seventh circuit recognized that an insurance

company may be liable for its delay in passing upon an application for insurance but held that the facts were such as to exonerate the company from liability. It is generally recognized that the legislative policy in granting to insurance companies a franchise rests on the theory that chartering such an association is in the interest of the public to the end that indemnity on specific contingencies shall be provided those that are eligible and desire it, and for their protection the State regulates, inspects and supervises their business.¹⁰ Policies of insurance are ordinarily dated as of the day the application is signed and an insurance company should not be permitted to unduly prolong the period for which it is expecting payment without incurring risk, and if the policy is not dated until the application is approved at the home office, then it should not be permitted to unduly delay in delivery of the policy, during which time the applicant is unprotected, and at the same time no refund is made him on the amount of the premium when no risk was incurred on the contract theory until the delivery of the policy and the payment of the premium, or if, within a reasonable time after the date of the policy, the applicant remains in good health but thereafter becomes ill before delivery of the policy by the agent, and because of the agent's negligence the policy is not delivered while the applicant is a suitable risk, then a right of action accrues against the agent and the company for the loss sustained by such negligence, and this is true even though no premium has been paid in advance by the applicant.¹¹

Some courts have held that the remedy based on negligence is founded on reason and justice and that where the insurance company accepted conditionally the first annual premium, the transaction makes the insurance company applicant's trustee for the return of the premium if the application is rejected, and for the unconditional acceptance of the premium if the application is approved and the policy delivered; that the receipt implies time for a proper investigation of the risk under consideration and that good faith and fairness of both parties are required in negotiations for insurance. The retaining of the money of the applicant beyond a reasonable time would deprive him of its possession and use during the delay. The use of money or interest thereon is a valuable right and negligence or unexcusable delay on the part of a trustee is a wrong if it deprives the beneficiary of the use of a trust fund which has

¹⁰ *Duffy vs. Bankers Life*, 139 N. W. 1087.

¹¹ *Fox vs. Volunteer Life Ins. Co.*, 116 S. E. 266.

served its purpose as such.¹² In the foot note are given cases which hold an insurance company liable in tort under varying circumstances.

Thus it is submitted that even though an application for insurance should contain a stipulation "That if said application is not approved and accepted said company shall incur no liability thereunder," the insurance company is not excused from its duty to use diligence in transmitting the application and medical report, in the event of health and life insurance, and in passing upon said application and in delivering the policy of insurance or notifying the applicant, within a reasonable time, whether or not the application has been accepted or rejected. Such a stipulation in an application has no binding effect in considering liability in tort for it is without consideration, and it is more reasonable to say that when an applicant elects an insurance company of his choice he is lulled into security that the application for a policy will be handled with diligence because of the very nature of the business the insurance company is engaged in, and when an insurance company obtains an application for insurance it impliedly obligates itself to use diligence in handling it. The fact that a premium is not paid in advance does not lessen this duty. This company can either require a payment of the premium upon the taking of the application or upon the delivery of the policy, and when it elects to collect the premium upon delivery of the policy then by its conduct it should be estopped, under recognized principles of law, to set up as a defense to an action for negligence the failure of the applicant to have paid the premium in advance.

¹² *Boyer vs. State Farmers Mutual Hail Ins. Co.*, 121 Pac. 329, (Kan.); *Childers vs. New York Life Insurance Co.*, 245 Pac. 59; *Columbian Natl. Life Ins. Co. vs. Lemmons, Admr.*, 222 Pac. 255; *Deford vs. New York Life Ins. Co.*, (Colo.) 224 Pac. 1049; *Dyer vs. Missouri State Life Ins. Co.*, 232 Pac. 346; *Elam vs. Realty Co.*, 182 N. C. 602, 109 S. E. 633; *Fox vs. Volunteer State Life Ins. Co.*, 116 S. E. 266; *Jackson et al. vs. N. Y. Life Ins. Co.*, 7 Fed. (2nd) 31; *Live Stock Ins. Assn. vs. Stickler*, 115 N. E. 691; *N. W. Mutual Life Ins. Co. vs. Neafus*, (Ky.) 140 S. W. 1026; *Paul vs. Ins. Co.*, (N. C.) 110 S. E. 847; *Security Ins. Company of New Haven, Conn. vs. Cameron*, (Okla.) 205 Pac. 151; *Stearns vs. Merchants Life & Casualty Co.*, 165 N. W. 568; *Wallace vs. Hartford Fire Ins. Co.*, (Id) 174 Pac. 1009.

GUARANTY OF BANK DEPOSITS IN EIGHT STATES†

By A. B. BUTTS*

(See article by the same author, *State Regulation of Banking by Guaranty of Deposits*, *Mississippi Law Journal*, Volume 2, p. 208, November 1929, a discussion of the history and the operation of the guaranty law in the State of Mississippi.—Ed.)

More than two decades ago the idea of the guaranty of bank deposits was written into the laws of the State of Oklahoma. Within a month after its admission as a State, and while the panic of 1907 was running its course, Oklahoma enacted its guaranty law.¹

Seven other States have enacted guaranty laws: Kansas in 1909,² Texas in 1910,³ Nebraska in 1911 (Law enacted in 1909, but suspended by injunction bill until 1911),⁴ Mississippi in 1914,⁵ South Dakota in 1915,⁶ and North Dakota⁷ and Washington in 1917.⁸

Bank-guaranty became a question of importance in other States than the eight in which legislation was enacted. The other States that gave the subject serious consideration were Arizona, Arkansas, Florida, Georgia, Tennessee, Iowa, Wisconsin, Missouri, Colorado, Nevada, Minnesota, Montana, and North Carolina.⁹

By legislative enactment seven of the eight States have repealed their bank guaranty laws. In one State, Mississippi, the guaranty law has been suspended until outstanding certificates are liquidated.¹⁰

† This paper was prepared under the direction of Professor Roscoe B. Turner at Yale University School of Law.

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1 Compiled Statutes of Oklahoma, 1921, Chapter 34.

2 Revised Statutes of Kansas, 1923, Chapter 9.

3 Digest of Banking Laws, Texas, 1923, Chapter 7.

4 Laws of Nebraska, 1909, Chapter 10; Compiled Statutes of Nebraska, 1922, Secs. 7995-8035 (Sec. 8028 on guaranty fund); Session Laws, 1923, House Rule No. 272 and No. 237, Chapter 191, Sec. 26.

5 Hemingway's Mississippi Code, 1917, Secs. 3591-3605, as amended by Laws of 1922, Chapter 172.

6 Revised Code of South Dakota, 1919, Art. 3, Secs. 9005-9031; Session Laws, 1921, Chapter 136.

7 Laws of North Dakota, 1923, Senate Bill No. 250, Chapter 200.

8 Remington's Code, Washington, Secs. 3293-3312.

9 Federal Reserve Bulletin, September 1925, p. 627; Thomas Bruce Robb, *The Guaranty of Bank Deposits* (1921), Chapter 7, p. 160.

10 Laws of Mississippi, 1930, Chapter 22.

It may be observed at the outset that recent experiences under the guaranty laws have been quite similar in several States. "Generally the laws seemed to work well for a period, winning popular favor by providing for prompt discharge of all deposit liabilities of failed banks," says the Report of the Federal Reserve Board. And this Report says further: "Generally the laws have been commended from year to year by State bank commissioners or superintendents in their annual reports as providing precisely the guaranty originally intended; and generally also . . . bank failures have piled up obligations against the funds in excess of resources immediately, or in some cases, as it would appear, ultimately available under the law, with the result that those administering the fund have resorted to borrowing . . . or to the issue of certificates of indebtedness to depositors."¹¹ The five years that have elapsed since this statement was made serve only to make more certain the truthfulness of the observation.

It will perhaps not be amiss to give a brief summary of the guaranty laws of each of the eight States, followed in each case by a statement of the status of the guaranty fund.

In the case of each State the summary of the law as here given will include these topics: institutions included; participation, whether compulsory or optional; character of deposits guaranteed; maximum assessments in any one year; rate of interest on outstanding warrants or certificates of indebtedness. The administrative phases of the laws concerning method of payment of depositors, powers of State Boards or Commissioners, disposition of the guaranty funds, and the requirements as to the basis and rate of regular and special assessments will not be considered here.

For convenience of comparison, a tabular presentation of the phases of the guaranty laws under consideration will be given.¹²

(1) Institutions included:

Oklahoma: Every bank, and savings departments of trust companies.

Kansas: Any bank doing business in the State with an unimpaired surplus of 10 per cent of its capital and any bank authorized to do business in the State after the passage of the act which shall have been actively engaged in business for one year and having such surplus.

Texas: Every corporation hereafter incorporated under the laws of Texas with banking and discounting privileges, and bank-

¹¹ Federal Reserve Bulletin, September 1925, p. 626.

¹² See Federal Reserve Bulletin, September 1925, pp. 626-668.

ing and trust companies heretofore incorporated under the Texas banking law or hereafter incorporated.

Nebraska: Every corporation engaged in the business of banking.

Mississippi: Every bank organized and existing under the laws of Mississippi.

South Dakota: Every bank engaged in the business of banking under the laws of South Dakota.

North Dakota: Every corporation, except national banks, whose business in whole or in part consists of the taking of deposits or buying or selling exchange, shall be subject to the provisions of this act, and trust companies doing a general banking business separate and apart from the writing of surety bonds and other general business, and building and loan associations receiving savings deposits shall also be subject to the provisions of this act.

Washington: Any corporation organized under the laws of Washington authorizing the organization of banks or trust companies, except mutual savings banks, and engaged in the banking business in this State.

(2) Participation, whether compulsory or optional:

Oklahoma: Compulsory:

Kansas: Optional.

Texas: Compulsory. Banks were permitted to elect whether they would secure their depositors by the guaranty-fund system or the bond-security system, but such depositors must be secured by one or the other of such systems.

Nebraska: Compulsory.

Mississippi: Compulsory.

South Dakota: Compulsory.

North Dakota: Compulsory.

Washington: Optional.

(3) Character of deposits guaranteed:

Oklahoma: Deposits of failed banks, but no deposit otherwise secured, nor any deposit on which a greater rate of interest is allowed than is permitted by the rule of the bank commissioner.

Kansas: All deposits not otherwise secured; but the guaranty shall not apply to a bank's obligations as indorser upon bills rediscounted, to bills payable, to money borrowed from its correspondents or others (any deposit on which a greater rate of interest is paid than the rate approved by the bank commissioner shall be considered money borrowed), or deposits or credits obtained by fraud or in violation of law, or evidence of debts fraudulently issued.

Texas: All deposits, provided, however, no deposit upon which interest is being paid or contracted to be paid; no deposit secured in any way; no certificate of deposit, whether interest bearing or not, that shall have been changed to a non-interest-bearing unsecured deposit within 90 days prior to the closing of the bank by the commissioner; no deposit of public funds, whether interest-

bearing or not; and no deposit made by a creditor for the purpose of converting a loan held against the debtor bank into a non-interest-bearing unsecured deposit shall be protected or insured by the guaranty fund. Cashiers' checks, bank drafts, or exchange issued against or arising from bona fide unsecured non-interest-bearing deposits shall be protected under the guaranty fund. Non-interest-bearing certificates of deposit issued by State banks and trust companies are not protected or insured by the guaranty fund.

Nebraska: The guaranty fund is for the protection of depositors, but no money deposited in any bank upon any collateral agreement other than an agreement for length of time to maturity and rate of interest shall be guaranteed by the depositors' guaranty fund. No claim of priority in the assets of a failed bank shall be allowed which is based on evidence of indebtedness in the hands of, or issued to, a stockholder, officer, or employee of a failed bank which represents money obtained by such stockholder, officer, or employee for the purpose of effecting a loan to such failed bank.

Mississippi: All deposits not otherwise secured and all cashiers' checks, certified checks or sight exchange issued by banks operating under the guaranty fund act. The guaranty shall not apply to a bank's obligations as endorser, upon bills rediscounted, nor to bills payable nor to money borrowed from its correspondents or others, nor to deposits bearing a greater rate of interest than 4 per cent per annum.

South Dakota: All deposits not otherwise secured shall be secured by the guaranty fund, but such guaranty shall not apply to a bank's obligations as indorser upon bills rediscounted, nor to bills payable, nor to money borrowed from its correspondents or others. Banks which have fully complied with the provisions of the guaranty fund act are not required to give any further security for the purpose of being a depository of public funds, but such funds shall be secured in the same way private funds are secured.

North Dakota: All deposits for which money or its equivalent, and for which full value has been received by the bank wherein such deposit is made shall be guaranteed, but the guaranty provided for in the act shall not apply to a bank's obligations as indorser upon bills rediscounted nor to bills payable, nor to money borrowed from its correspondents or others, nor deposits otherwise secured, nor deposits upon which compensation in any manner or form or by whatever device has been promised or paid in excess of the rate of interest as limited in this act.

Washington: Deposits not otherwise secured, but the guaranty provided for in this act shall not apply to a bank's obligations as an indorser upon bills rediscounted, nor to bills payable, nor to money borrowed from its correspondents or others, nor deposits of public money in excess of its capital and surplus. The guaranty of the guaranty fund shall extend to public funds, of, or under the control of the State, or any county or municipality

within the State deposited in guaranteed banks to an amount equal to, but not in excess of, the capital and surplus of such bank if the custodian of such fund shall elect to deposit the same under the guaranty of such fund.

(4) Maximum assessments in any one year:

Oklahoma: One-fifth per cent and in fiscal years ending in 1914, 1915, and 1916 an additional one-fifth per cent special assessment.

Kansas: Not more than five assessments of one-twentieth per cent each of the average guaranteed deposits less capital and surplus shall be made in any one year.

Texas: Two per cent of average daily deposits; but this limitation not applicable to first payment to the guaranty fund required of any bank which shall hereafter elect to secure its deposits in the depositors' guaranty fund.

Nebraska: Six-tenths of one per cent of average daily deposits exclusive of public money otherwise secured, until the guaranty fund reaches the sum of one and one-half per cent of such deposits.

Mississippi: Five assessments of one-twentieth of one per cent each, of the average daily deposits.

South Dakota: One-fourth of one per cent of the average daily deposits, less the amount of the deposits not eligible to guaranty, annually, until the fund amounts to one and one-half per cent of the average daily deposits.

North Dakota: Five assessments of one-twentieth of one per cent each of the average daily deposits.

Washington: One-tenth of the average deposits eligible for guaranty, assessed annually, until the fund shall equal 3 per cent of all deposits eligible for guaranty in all member banks.

(5) Rate of interest on outstanding warrants or certificates of indebtedness:

Oklahoma: Six per cent.

Kansas: Six per cent unless a contract rate exists on the deposit, then the certificate shall bear the contract rate.

Texas: Six per cent.

Nebraska: Rate of interest shall be fixed by the court.

Mississippi: Six per cent.

South Dakota: If issued in favor of the bank to be sold by the Superintendent of Banks and proceeds paid to depositors, not more than 7 per cent, but if issued payable to the depositors for the amount of their claims, 5 per cent.

North Dakota: Six per cent.

Washington: Five per cent, if there is not sufficient money in the guaranty fund to pay depositors.

OKLAHOMA

The bank guaranty plan operated in Oklahoma for fifteen years. During the first seven years of the law the fund

went into arrears heavily on account of bank failures, but better conditions obtained for the five years following and in 1920 the guaranty fund showed a surplus. The post-war depression brought a severe test to the banks; credit and values collapsed in the stress of depression and numerous banks failed, resulting in plunging the guaranty fund deeply into debt. Over fifty bank failures occurred in 1921 and 1922, and in the same period almost one hundred State banks nationalized. By the end of 1922 claims of depositors in failed banks ran the fund almost seven and a half million dollars into arrears, and the interest accruing on these unpaid claims was over three times as great as the current assessments levied.

The Oklahoma guaranty law was repealed by an act of the legislature in March 1923.¹³ At the time of the repeal there were to date outstanding banking board warrants of approximately a million and a quarter dollars. There was a number of unpaid deposits in failed banks for which no warrants were ever issued on account of the insolvency of the fund. It is estimated by the State Banking Department that there are at present about a million dollars of unpaid deposits. There is something like \$220,000 cash on hand to apply to the outstanding banking board warrants. In addition to that, the State Banking Department holds over a million dollars of practically worthless assets belonging to the guaranty funds, by reason of bank failures. No provision was made for paying off the debts of the fund.¹⁴ Only the small proceeds recoverable from the liquidation of failed banks, plus the small amount of cash on hand, it would seem, are available for this purpose. Small comfort is given the depositors of failed banks by the provision of the repealing statute which reads: "Provided, That the provisions of this section shall not relieve or release any bank, firm, or corporation, or any officer, stockholder, or director, or any other person from any obligation, assessment, or liability to the depositors' guaranty fund or to the depositors or creditors of any failed State bank, which obligation, assessment, or liability existed at the time of the passage and approval of this act."¹⁵

KANSAS

The bank guaranty law of Kansas was in effect for twenty years; the law became effective June 30, 1909, and

¹³ Laws of Oklahoma, 1923, Chapter 137.

¹⁴ Letter to writer from C. G. Shull, Bank Commissioner of the State of Oklahoma, November 19, 1929.

¹⁵ Laws of Oklahoma, 1923, Chapter 137, Sec. 10.

was repealed March 14, 1929. The Kansas law was not obligatory upon all banks. The high point in the operation of the Kansas guaranty system was reached in February 1922, when out of 1,108 banks in the State there were 714 banks which were operating under the guaranty fund system. This number was gradually decreased by voluntary withdrawals and forfeitures, so that in January 1929, out of 854 State banks there were 34 banks which remained members of the guaranty system.

Shortly before January 1926, sixteen guaranteed banks in Kansas withdrew from the fund and brought suit to determine the amount of their liability to the fund, there having been up to that time 78 failures among guaranteed banks. At that time there were outstanding guaranty fund certificates of approximately five and one-half millions of dollars. The Supreme Court of Kansas handed down a decision¹⁶ to the effect that a guaranteed bank, upon withdrawal from the fund, was liable only to the extent of its bonds on deposit with the State Treasurer to guarantee the payment of assessments. Immediately following this decision the member banks began to withdraw from the fund, either voluntarily or by default in the payment of their assessments.

The fact that the Kansas system was the principal one¹⁷ of the voluntary plans of bank guaranty makes it not inappropriate to call attention to the amounts collected over a period of years for the credit of the guaranty fund. The guaranty law of Kansas provided that the bank commissioner could levy not to exceed five assessments a year of one-twentieth of one per cent of the average guaranteed deposits, less capital and surplus of each bank. Amounts received from assessments were as follows:

1920.....\$ 85,379.79	1925.....\$342,890.51
1921..... 91,007.81	1926..... 129,405.50
1922..... 155,962.34	1927..... 24,896.28
1923..... 74,692.12	1928..... 8,994.88
1924..... 343,728.42	1929..... 1,321.00

On March 14, 1929, the date on which the Kansas guaranty law was repealed, the thirty-four banks which were still members of the fund and had paid their assessments regularly, demanded a return of the bonds which they had deposited with the bank commissioner to guarantee the payment of their assessments. At that time a suit was instituted praying mandamus to compel the bank commissioner to

¹⁶ 121 Kansas Reports 151 (1926).

¹⁷ The Washington law was optional, and in Texas the banks could choose between the guaranty plan and a bond security system.

return the bonds pledged by the member banks. In an opinion delivered by Justice Richard J. Hopkins, the court held that the bonds were needed to pay claims against failed member banks, whose affairs had not been closed within six months of the time when the banks attempting to recover their bonds endeavored to withdraw from membership.

The status of the Kansas guaranty fund certificates outstanding as of October 31, 1929, was \$13,706,682.69, less dividends paid of \$6,859,408.37, leaving a balance due of \$6,847,274.32. The court held that these various certificate holders had a vested right in the bonds pledged by the member banks and the bank commissioner was not ordered to return the bonds.¹⁸ No arrangements other than the continued liquidation and collection of the assets of the failed banks were made to pay off the claims of the guaranty fund.

TEXAS

The Texas bank deposit guaranty plan was a dual system, since banks could choose between the guaranty plan and a bond-security system. Experience with deposit guaranty in Texas covered a period of seventeen years. During the first ten years comparatively few banks failed. Of the 983 State banks in 1920, all but 42 operate under the guaranty fund plan. From the early part of 1920 until the close of 1925 about one hundred and fifty banks failed with a net loss to the guaranty fund of about thirteen million dollars. The immediate results brought about by this situation may be summarized: a large cash drain fell upon the solvent banks (The Texas law made no provision for the issuance of warrants against the fund during periods of frequent failures); during the first half of 1925 nearly seventy State banks nationalized; many guaranty plan banks sought the right to switch over to the bond-security plan of guaranty; early in 1925 a law was passed permitting the shift. The subsequent history of the Texas guaranty plan followed the usual course; during the next two years about forty more banks failed, with further losses to the guaranty fund; by 1927 all but twenty-five banks had withdrawn from the guaranty fund system; there were 721 banks under the bond-security plan by 1927, which meant that the guaranty fund plan was virtually dead.

With the guaranty fund plan no longer extensively used in Texas, the bond security plan gave some protection to

¹⁸ Letter to writer from H. W. Koenek, Bank Commissioner of the State of Kansas, November 19, 1929.

depositors until a decision rendered by the Supreme Court of Texas¹⁹ made the latter plan ineffectual. The court held that "the bonds by deposit of which a State bank is permitted . . . to secure its depositors by the bond security, instead of the State guaranty system may be those owned by the bank itself and constituting a part of its assets." This meant that the Bank Commissioner was required to accept in lieu of a surety bond government and municipal bonds which were part of the bank's assets. Prior to this decision the bank commissioner had refused such bonds on the ground that they would not provide the additional security above the regular assets which the law intended. A bank could, under this interpretation of the law, after having withdrawn from the guaranty fund system, deposit some of its regular assets in the form of approved bonds with the banking commissioner and thus be free of any special liability to depositors.

The Texas guaranty law was repealed on February 11, 1927. The amount outstanding against the guaranty fund at that time was \$2,323,883.99. No arrangements were made by the repealing statute for paying off the liabilities against the guaranty fund. Claims against the fund have not been paid off, and, it is stated that several suits involving the fund will keep the matter in litigation for several years.²⁰

SOUTH DAKOTA

The guaranty fund system of South Dakota promised to be successful during the first five or six years of its operation, for from 1916 to the beginning of 1922 the loss to the fund was not great; but the failure of about one hundred and forty banks during the next period of three years put the guaranty fund badly in arrears. The first real dissatisfaction with the mutual guaranty fund system did not result in the repeal of the guaranty plan outright; instead, a statute was enacted requiring each state bank to build up a fund against its own failure only.²¹

¹⁹ *Texas Bank & Trust Company vs. Chas. O. Austin*, Bank Commissioner, 115 Texas Reports 201 (1926).

²⁰ Letter to writer from J. E. Roberts, Deputy Bank Commissioner of the State of Texas, November 19, 1929.

²¹ The law provides that each bank shall pay annually, in cash or approved securities, about the same assessments as under the old law. The assessments are placed not in a mutual fund but with the state treasurer, who sets up a separate account for each bank, allowing its balance to be dormant or investing it in approved securities. When the account, with accruals, reaches an amount equal to the capital stock of the bank, no further assessments are levied against that bank and the entire amount is retained in trust only to indemnify the creditors of that bank against loss on its failure. This amount, together with the double liability ordinarily imposed on shareholders in South

In 1925 the legislature of South Dakota passed an act for the repeal of the guaranty system, to be effective January 1, 1926. A petition was filed requiring submission of the act to referendum at the general election in 1926, and at this election the people by a small majority refused to ratify the act repealing the guaranty law. At this same meeting of the legislature a bill which proposed a tax levy to take up the outstanding certificates of indebtedness, then over twenty-five million dollars, was defeated. In 1925 and the first half of 1926 sixty-seven more banks failed; the total liabilities against the guaranty fund amounted to over forty million dollars on June 30, 1926. A decision of the Supreme Court of South Dakota rendered in December 1926, holding that any state bank might convert into a national bank and withdraw from the guaranty system without liability by paying its current assessment, greatly weakened the bank deposit guaranty plan.²² The fact that there was the forty million dollar deficit; that probably more banks would fail; and that already, at five per cent interest per annum on the guaranty fund deficit, the annual interest charge was two million dollars, made this decision very pleasing to banks that wished to nationalize.

On July 1, 1927, the South Dakota mutual bank deposits guaranty law was repealed. The amount outstanding against the guaranty fund at that time was \$42,879,516.21. No arrangements were made under the repeal statute for paying off the claims against the guaranty fund. The amount still due depositors under the guaranty law is \$40,058,559.47. This amount, however, will be reduced by liquidation of the assets of the suspended banks to approximately \$25,000,000.00, it is estimated.²³

NORTH DAKOTA

The North Dakota guaranty system which went into effect in 1917 ran into difficulties very early, due to the post-war depression. The total number of bank failures reached about one hundred and ninety by the end of 1925. By that

Dakota banks, assures ultimately a fund against losses equal to three times a bank's capital. Laws of South Dakota, 1929, Chapter 73, Sec. 9016, amending Chapter 102, Sec. 12, Art. 3, Laws of 1915, and Chapter 123, Session Laws of 1919, Chapter 54, Laws of 1927.

²² Citizens' State Bank of Garden City vs. Smith, Superintendent of Banks, 50 S. D. Reports 579, 210 N. W. 990 (1926).

²³ Letter to writer from F. R. Smith, Superintendent of Banks, State of South Dakota, November 26, 1929.

time the total claims against the guaranty fund amounted to almost twenty million dollars; the maximum yearly assessment of about \$180,000 at the time amounted to less than one-fifth of the interest accruing. More failures came after 1925. In 1928 plans were considered for proposing a bond issue of twenty million dollars to pay off depositors of failed banks holding claims against the guaranty fund. The proposal was not adopted.

The 1928 session of the North Dakota legislature passed a bill repealing the guaranty fund act of the State, the repealing act to become effective July 1, 1928; but before this date the people of the State circulated petitions, under the referendum law, and the bill was referred to the voters at the next general election, held in June 1930. The result of this election was 94,124 for repeal and 55,853 against repeal. The amount due from the guaranty fund to depositors of closed banks was \$24,111,541.97 on October 1, 1929. No provision was made at the time of the repeal of the law to pay off this amount.²⁴

WASHINGTON

The experience of the State of Washington with bank guaranty was brief and unusual. The Washington system became effective in March 1917; it went out of existence in fact by the end of 1921, though the law was not repealed until 1929.²⁵ During the first four years of the operation of the Washington guaranty system no bank failures occurred among the guaranteed banks. On June 30, 1921, one hundred and twenty banks with guaranteed deposits aggregating seventy-one million dollars were members of the system. With two exceptions these banks were banks with total deposits of less than two million dollars each. The exceptions were banks with total deposits of over fifteen millions and eleven millions. On July 1, 1921, the larger of these two banks, the Scandinavian American Bank of Seattle, with guaranteed deposits totaling almost eight and a half million dollars, failed. This completely broke down the guaranty system in Washington. By the end of 1921 every bank had withdrawn from the system. The liquidation of this bank was not completed until 1927. Depositors of that bank were paid eighty-five per cent of their claims,

²⁴ Letters to writer from Gilbert Semingson, State Bank Examiner of North Dakota, November 19 and December 3, 1929.

²⁵ Laws of Washington, 1929, Chapter 11.

of which the guaranty fund paid ten per cent.²⁶ The only reference in the repealing act to the balance due the depositors of the failed bank is the section which reads: "This repeal shall not be considered as affecting any rights accrued or obligations incurred under said acts or either of them or the completion of any actions or proceedings begun under the provisions thereof, or the collection and distribution of any funds under the provisions of said acts."²⁷

MISSISSIPPI

The Mississippi guaranty system went into effect May 15, 1915. The law provided for five one-twentieth of one per cent assessments annually on total deposits, less capital and surplus. In the beginning the maximum assessments were not levied. Only one assessment was made each year for the first two years; then two assessments were made a year; then three; then with a threatened depletion of the guaranty fund the full five assessments were made each year. The five assessments a year have been levied since 1920. During the first ten years of the operation of the guaranty law twenty-eight banks failed, the majority during 1921 and 1922; and until about the close of the first ten-year period it seemed as if the guaranty law would produce the results that it was intended to achieve by such a system.

In May 1929 the Superintendent of Banks of Mississippi reported that fifty-two banks had been taken over by the Banking Department since the guaranty law went into effect; that the depositors in twenty-seven of the failed banks had been paid in full, in some of which it was not necessary to use the guaranty fund at all; and that the deficit in the guaranty fund at that time was \$3,074,288.71.²⁸ The total

²⁶ Letter to writer from S. Zeno Varnes, Deputy Supervisor of Banking, State of Washington, November 19, 1929.

²⁷ Laws of Washington, 1929, Chapter 11.

²⁸ The Mississippi Banker, Journal of the State Bankers Association of Mississippi, Vol. 13, No. 12, May 1929, pp. 55-56.

Examination of the decisions of the Supreme Court of Mississippi under the guaranty law reveals a definite tendency on the part of the court to extend the benefits of the guaranty plan in as broad manner as possible. In *Anderson, Bank Examiner, vs. Owen*, (1916) 112 Miss. 476, 73 So. 286, the court stated that "the remedial and salutary effect of the statute should not be restricted or limited by any narrow interpretation." In *Anderson, Bank Examiner, vs. Baskin and Wilbourn* (1917), 114 Miss. 81, 74 So. 682, the court, *En Banc*, held that the general creditors are entitled to participate in the distribution of the assets of an insolvent bank along with depositors; the dissenting opinion of Justice Ethridge, in which Justice Cook concurred, in this case is of interest; see 35 Okla. 535, 35 Okla. 404, 33 Okla. 535, where the Supreme Court of

assessments received for the guaranty fund from the over three hundred State banks runs about \$300,000 a year. The interest on guaranty certificates outstanding is about \$125,000 to \$135,000 a year, leaving only about \$175,000 a year to be used in liquidating guaranty certificates outstanding. The State Superintendent of Banks has made this statement:²⁹

"The time is rapidly coming when assessments will take care only of interest payments, and then would arise an intolerable condition. The only thing that can be done is to repeal the guaranty act, applicable to the future. The banks now operating under the act should be required to retire the outstanding indebtedness against the fund, but no more should be issued. If the guaranty feature is repealed, it is my prediction that the banks would get together and quickly retire the outstanding certificates and get it behind them."

At its meeting in May 1929 the Mississippi Bankers' Association adopted resolutions looking to the repeal of the guaranty law and appointed a committee to co-operate with the State Superintendent of Banks "to work out such terms and conditions for the repeal of the act as will meet with the approval of the State legislature."³⁰

The 1930 session of the legislature of the State enacted a statute (Chapter 22, Laws of 1930) suspending the operation of the guaranty of deposits law until outstanding certificates are liquidated, at which time the guaranty law is to again become operative. The act provides for issuance of State bonds in the amount of about \$5,000,000.00 for retirement of outstanding bank guaranty certificates issued prior to March 11, 1930 to depositors in failed banks. Banks will continue to pay assessments as in the past, such assessments to be used for the retirement of the bonds. Meantime depositors will be partially protected under a year-by-year payment plan under which banks are required to pay a three per cent annual assessment upon their tax-exempt surplus. By this method a depositors' Protection Fund of

Oklahoma held that depositors take prior claim to general creditors. Public funds are guaranteed under the Mississippi deposit-guaranty act: 114 Miss. 850, county funds; 131 Miss. 93, city funds; 100 So. 277, state funds. Fraud on the part of the bank's officer did not constitute cause for not allowing the innocent depositor to claim protection under the guaranty act, 135 Miss. 110; see also, 134 Miss. 639. In 134 Miss. 729 it was held that "all deposits not otherwise secured" includes a special deposit as well as general deposits. See also, 102 So. 279; 100 So. 179.

²⁹ J. S. Love, Superintendent of Banks, State of Mississippi, in the Memphis Commercial Appeal, news item, November 10, 1929.

³⁰ The Mississippi Banker, Journal of the State Bankers' Association of Mississippi, Vol. 13, No. 12, May 1929, p. 54.

not to exceed \$300,000.00 a year is to be collected from the banks.

In *Mangum vs. Love, Superintendent of Banks*, heard in the Simpson County Chancery Court, Chancellor T. Price Dale held the act unconstitutional; but in *Deposit Guaranty Bank and Trust Company vs. City of Jackson*, Judge W. H. Potter in the Hinds County Circuit Court held that the statute is "clearly constitutional." Both of these cases were appealed to the Supreme Court of Mississippi, where they are now (January 1931) pending.

NEBRASKA

The Nebraska bank deposits guaranty law was passed March 25, 1909. From the start the banks of Nebraska, both state and national, were opposed to a guaranty law, an attitude which led the northern group of the Nebraska Bankers' Association to pass a resolution on April 23, 1909, a month after the passage of the law, voicing their disapproval of the law and sanctioning actions seeking to test the legality of the measure. Very soon, therefore, a suit was filed in the name of fifty-two banks to test the validity of the law.³¹ The Nebraska law had been largely patterned after the Oklahoma law. It is not surprising that the contention of the Nebraska bankers was much the same as that of the Oklahoma bankers in the litigation that had been commenced to test the legality of the Oklahoma guaranty law.³² Among other things, the bankers contended that the guaranty feature of the law was an arbitrary and capricious exercise of power, in that it takes the assets of solvent banks without compensation and appropriates the same to the payment of private debts of insolvent banks; that it was a taking of property for a private use without due process of law and without compensation; that it was not a proper exercise of the police power, since the police power cannot justify the invasion of any property or contract right of the citizen granted him under the constitution; and that the principle which underlies the bank guaranty deposit laws, when carried to its ultimate legitimate result, means unrestrained socialism in State government.³³

On June 30, 1909, a few days before the law was to go into effect, Circuit Judge Willis Van Devanter and District Judge Thomas C. Munger granted a temporary injunction restraining the State Banking Board from putting the law into operation. The same judges later decreed that the law

³¹ 176 Federal Reports 999.

³² Noble State Bank vs. Haskell, 219 U. S. 104.

³³ 176 Federal Reports 999.

was unconstitutional and made the injunction perpetual. The judges held that the law appropriated the assets of one bank to meet the obligations of another, and that this was taking the property of one person without compensation to pay the debts of another, in violation of provisions of the Fourteenth Amendment to the Federal Constitution. The case was appealed to the Supreme Court of the United States. The court advanced the Nebraska case and considered it with the Oklahoma³⁴ and Kansas³⁵ cases which were pending, and handed down a unanimous decision upholding the constitutionality of all three laws.³⁶ Justice Holmes in his opinion overruled the decree of Justices Van Devanter and Munger and dissolved the permanent injunction by which they had restrained the State Banking Board from putting the Nebraska law into operation.³⁷

The Nebraska law had been in the courts nearly two years. The Attorney-General of Nebraska ruled that the banks would not be required to pay the assessments while the law was in litigation and the State legislature soon after amended the law omitting such assessments and provided that the assessments should begin on July 1, 1911.³⁸

During the first ten years of the operation of the Nebraska guaranty law only seven banks failed, with negligible loss to the fund. Then, as was the case in some of the other States, the post-war depression suddenly changed the situation. Nearly one hundred and forty banks failed from January 1921 until March 1928. The fund was placed badly in arrears. In addition to the banks already failed, over seventy banks in weakened condition were in March 1928 being operated by the Guaranty Fund Commission. At that time, when the law had been in operation about seventeen years, over thirty-eight million dollars had been paid to depositors of failed banks, of which amount fifteen millions were paid out of assessments to the guaranty fund.³⁹

In 1909, at the time of the enactment of the guaranty fund law in Nebraska, there were 659 State banks, with a capital of \$12,000,000.00 and deposits of \$71,000,000.00; in 1928

34 *Noble State Bank vs. Haskell*, 219 U. S. 104, decided January 3, 1911.

35 *Assaria State Bank vs. Dolley*, 219 U. S. 121, decided January 3, 1911.

36 *Shallenberger vs. First State Bank of Holstein*, 219 U. S. 121, decided January 3, 1911.

37 It is interesting to note that the day after his opinion was overruled, Justice Van Devanter was sworn in as an Associate Justice of the Supreme Court of the United States. See, Thomas Bruce Robb, *The Guaranty of Bank Deposits*, Chapter 5, p. 136.

38 *Laws of Nebraska*, 1911, Chapter 8.

39 *Guaranty of Bank Deposits*, in *Commerce Monthly of the National Bank of Commerce of New York*, Vol. 10, January 1929, pp. 12-15, 27-30.

there were 739 State banks, with a capital of \$19,000,000.00 and deposits of \$268,000,000.00. This would seem to indicate great prosperity in the business of State banks in Nebraska. But the assessments exacted of State banks in Nebraska since the year 1920 aggregate in excess of \$16,000,000.00. Since 1920 the number of bank failures has been of alarming proportions: in 1920 the number of State banks was 1009; at the close of the year 1928 there were 739 State banks, 270 State banks having ceased business because of insolvency in the eight-year period. From January 1, 1929 to December 1, 1929, a period of only eleven months, 127 State banks failed.⁴⁰

In December 1928 an injunction suit was begun in the District Court for Lancaster County by the Abie State Bank, in which it was joined by 558 other Nebraska State Banks. The suit was brought to enjoin the collection of a special assessment of one-fourth of one per cent of the average daily deposits from the State banks for 1928. It was alleged by the banks that the special assessment together with the regular assessment to the guaranty fund was of such confiscatory nature as would, in a few years, deplete or wipe out the entire capital stock of the State banks, since such assessments were already exceeding the net annual earnings of the banks.⁴¹ The majority of the State banks, therefore, joined in this suit, and meantime declined to pay further assessments to the guaranty fund.

The special assessment complained of in the Abie State Bank case was made December 15, 1928, by the Department of Trade and Commerce, for the benefit of the depositors' guaranty fund, pursuant to authority conferred by Section 8028, Compiled Statutes of 1922, as amended by Section 26, Chapter 191, Laws of 1923. The Act, as amended, follows:

"If the depositors' guarantee fund shall, from any cause, be depleted or reduced to any amount less than one per cent of the average daily deposits as shown by the last semi-annual assessment statement thereof filed, the department of trade and commerce shall levy a special assessment against the capital stock of the corporations governed by the provisions of this article, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment of depositors, said special assessment may be for any amount not exceeding one per cent of said average daily deposits for the year 1923, and thereafter not exceeding one-half of one per cent of said average daily deposits in any one year."

⁴⁰ See briefs for plaintiff and defendant, *Abie State Bank et al. vs. Arthur J. Weaver, Governor, et al.*, Nebraska Supreme Court, No. 27070.

⁴¹ *Ibid.* See, also, U. S. Daily, IV, 2719, p. 15, December 12, 1929.

A decision favorable to the banks was handed down by Judge Lincoln Frost of the District Court of Lancaster County, and the case was appealed to the Supreme Court of Nebraska.

In a five to two decision the Supreme Court of Nebraska, on December 7, 1929, reversed the action of the District Court, and held that the special assessments on State banks were not confiscatory, but was a reasonable regulation and not a taking of private property without due process of law. The decision rests on three broad grounds: first, that unless it is clearly shown that a legislative act is against public policy or contravenes clearly a provision of the constitution, the courts have no right to set it aside; second, that similar enactments have been upheld by the Supreme Court of the United States; and third, that the banks, having accepted the benefits of the legislation, and having made much in their advertising campaigns of the protection afforded by the act, cannot now be heard to protest its validity.⁴²

A motion for rehearing and ultimate appeal to the Supreme Court of the United States was announced by attorneys for the plaintiff banks.

The exact amount of the guaranty fund deficit at this time cannot be determined for the reason that no one can ascertain exactly the amount of salvage which may ultimately be collected from assets of the failed banks. A legislative committee made an investigation in February 1929, estimating the deficit at over sixteen million dollars. Disregarding the salvage, the fund owes now, according to terms of the law, over twenty-five million dollars, and this is drawing interest at seven per cent per annum, which means that if the law had remained in effect and the assessments had been restored to their maximum, the income from these assessments would have been less than the annual interest accumulation.⁴³ The Nebraska guaranty fund system was repealed in March 1930.⁴⁴

⁴² *Abie State Bank et al. vs. Arthur J. Weaver, Governor, et al.*, Nebraska Supreme Court, No. 27070, December 7, 1929. For record of the case, see *United States Daily*, IV, 2719, p. 15.

⁴³ Letter to writer from G. W. Woods, Bank Commissioner of the State of Nebraska, November 12, 1929, and letter from L. K. Roberts, Chief National Bank Examiner, Kansas City, Missouri, December 5, 1929.

⁴⁴ At a special session of the Nebraska legislature held in March 1930, a statute was enacted repealing the guaranty of deposits law; under the terms of the act the Depositors' Guarantee Fund is discontinued, but there is provided an annual assessment of two tenths of one per cent, during a period of ten years, upon the average daily deposits of each state bank for the Depositors' Final Settlement Fund.

THE RISING TIDE OF ADVOCATES†

By WILL SHAFROTH*

Coincident with the tremendous changes in the industrial world in the last forty years, there have been profound changes in the world of education. These have been not only changes of method, but also, and perhaps of more significance, changes in the attitude of the people toward education, which in turn have been translated into vastly increased facilities. In 1890 the total number of students in the universities, colleges, and professional schools in this country was 173,000. Since that time the percentage of increase, decade by decade and year by year, has been growing greater: 1900 showed an increase of twenty-nine per cent over 1890; 1910 was forty-eight per cent larger than 1900; and 1920 exceeded 1910 by fifty-seven per cent. The 1926 enrollment was fifty-eight per cent greater than that of the last year of the previous decade, and in the last four years the increase in the number is estimated to be more than the entire student body of 1890.¹ More than 900,000 students,² or in excess of five times the enrollment of 1890, are now being educated in the institutions of higher learning in this country. But even this mushroom growth is slow in comparison with the results shown by the figures of law school attendance as they appear in the following table:³

Year	1889- 1890	1899- 1900	1909- 1910	1919- 1920	1924- 1925	1925- 1926	1926- 1927	1927- 1928
Law school attendance	4,486	12,408	19,498	24,503	42,743	44,340	47,357	48,953
Percent of increase over last year of previous decade		176	57	25	74	81	93	98

It will be seen that the law school enrollment over the last thirty-eight years has increased approximately eleven times. There are several apparent causes for these astonishing results. In the first place, the country has grown

† Reprint, American Bar Association Journal.

* Adviser to the Council of the American Bar Association on Legal Education and Admissions to the Bar.

¹ Educational statistics from Department of the Interior, Bureau of Education Bulletin, 1928, No. 25.

² Estimated.

³ From the Annual Review of Legal Education for 1929, published by the Carnegie Foundation for the Advancement of Teaching.

vastly richer during this time and this greater wealth has been reflected in a higher standard of living for the majority of people, increased wages for the workingman, and an increased ability for the average wage-earning head of a family to give to his children advantages which were denied to him. Another cause has been the augmented complexity of modern life, sterner competition in certain fields of endeavor, and as a result a pressing need for the best equipment which can be gotten. Both these reasons apply with added force to the profession of law. Here is a calling with a certain standing. A day laborer who can make his son into a lawyer has advanced him both in the social and economic scale. Furthermore, a lawyer needs to have knowledge outside the mere limits of his profession if he is to meet his clients of the business world on an equal footing and understand their problems. This has been one of the causes which has led to a demand for a liberal as well as a technical education among lawyers, with the result that the majority of the students now entering law schools have had at least two years of pre-legal college study.⁴

Another corollary of the desire to face the world with a complete set of tools has been the trend among law students away from office study and toward law school training. Fifty years ago the great majority of our lawyers were office trained. Since that time as law school attendance has increased, office study has decreased. For the men who have had to support themselves while getting a legal education, the night school has sprung into being. But that has not meant that there is not abundant opportunity in the full time schools for those ambitious students wanting to work their way through. Mr. Walter J. Greenleaf of the Department of Education estimates that in the colleges and universities of this country, as a whole, a fifth of the men and a tenth of the women are entirely self-supporting, while about half of the men and a quarter of the women are contributing to their support by working part of the time. The existence of this condition has aided and abetted the drift from office study to law school, because many of the office study men in the past have had to earn their own living.

But the principal factor has been the realization that it is no longer possible to obtain a thorough legal training in an office. Gone are the days when the head of an office had the time and inclination to expound to a neophyte under his

⁴ The Carnegie Foundation Annual Review of Legal Education for 1929 shows the number of students in law school requiring two years of pre-legal college work to be 25,639.

care the doctrines of the law and their application as they had come under his observation. Instead of that the clerk may have the privilege of going to court and hearing the senior partner argue points of law having to do with the facts in one particular case, or, if he is industrious and persevering he may even find a brief in the office on some point related to the subject which he may be engaged in studying. But no more can he count on the preceptorship and active tutelage of a practitioner. The practitioner is too busy acquiring more knowledge himself to be able to sacrifice any precious minutes or hours in going over his work with a student. And this condition is not to be lamented, for in nine cases out of ten the student will acquire far more in a law school than he would in an office. His teachers are specialists in the subjects in which they instruct and the instruction is systematic and regular over a course which experience has shown can be covered in a given period of time. As William Draper Lewis well said:⁵

"The system by which a young man learned law in a law office has been dead for decades. The illusion that it still exists is one of those things that impede legal educational progress. To sit in a lawyer's office and read a law book, or to act as his typewriter or stenographer, is not to 'go through a law office' in the old sense of the word. The so-called office student of today learns his law not in the law office, but in the afternoon or evening law school. The law student has not left the law office, the law office has left the law student. In the modern law office there is a place for a typewriter, a bookkeeper and a clerk; there is a very real place for the law school graduate who is well-grounded in legal principles and knows how to find the law; but there is no place at all for the young man who wants to sit around and pick up the odds and ends of practice while he reads examination cram books or good or bad legal text-books."

The failure of the States to realize this makes this feature of our various systems of admission to the bar one of their most backward elements. Only four States refuse to recognize office study as full compliance with the requirements of legal education, declining to permit the candidates entire legal training to be gotten outside of a law school. Of these West Virginia requires three years of law school, Colorado three years of training of which two must be in a law school, Wyoming three years of which one must be in a law school, and Kentucky two years of which one must be in a law school. There are then forty-four States where the type of legal preparation which was in vogue during the

⁵ Excerpt from the speech of William Draper Lewis at the banquet given by the Conference of Bar Association Delegates, Washington, D. C., 1922.

Civil War is still recognized as sufficient to qualify an applicant to take the bar examinations, and this in spite of the fact that conditions are now much less favorable for office study than they were at that time.

But are we going to bar the John Marshalls, the Abraham Lincolns, the Grover Clevelands? This threadbare argument has been so often refuted that it is not necessary to answer it now. Suffice it to say that the men who will be barred because they cannot go to law school will be only those who do not have the ambition and industry which would be required to put them ahead in any walk of life. It would seem that there could be but little question that the course of training at any residential law school would be superior to office study under present conditions, but some men who acquired their law under the old system still fail to see the light and do not admit this. A few statistics from typical States regarding this point are significant.⁶

	Students from Resident Law Schools.			No Law School Study ⁷		
	Total	Passed	% Passed	Total	Passed	% Passed
California (1929)	440	272	62%	110	27	24%
Illinois (1924-1928)	3010	2013	67%	131	47	36%
Ohio (Dec. 1923-Jan. 1929)	3488	2672	77%	329	186	56%
Pennsylvania (1927-1929)	979	603	61%	142	51	36%

The Section of the American Bar Association on Legal Education and Admissions to the Bar has been pointing this out for years, and one reason it has not come home more definitely to the judges of our Supreme Courts and members of our legislatures is that there have been no comprehensive statistics on this subject. For this reason the Council is now asking the State Committees on legal education and the State Bar Examiners to furnish to it the results of their examinations in statistical form to show the percentage of those with every type of preparation who pass and who fail. With the co-operation of the local committees, very definite indications will be presented by the resulting figures, on which recommendations may be based.

It is true that only a small percentage of applicants now present themselves to the bar with only office study preparation. This, however, does not make the problem less serious, for the reason that it is evident that they are the group with the poorest training, and are therefore the ones with whom the bar is most seriously concerned. It is not necessary to emphasize here the public interest which is involved in admitting to practice only those candidates who are qualified. That has been fully discussed at every meet-

⁶ Statistics taken from reports of Bar Examiners.

⁷ Study with correspondence schools not regarded as law school study.

ing of the Section of Legal Education and Admissions to the Bar and in most of the speeches and articles on the general subject. The exponents of the "open door," who believe in "opportunity for the poor boy" as opposed to qualification, had full hearing at the last meeting of the Section in Memphis, and were overwhelmed by a vote of more than ten to one when the American Bar Association Standards were reaffirmed.

Progress in increasing the general educational requirements has been remarkable in view of the fact that it was less than nine years ago that the American Bar Standards were adopted, advocating two years of pre-legal college training. Now fifteen States⁸ have rules which demand that substantially all applicants for admission to the bar must have at least two years of college training, and in sixteen others⁹ the State bar associations have given their endorsement to the American Bar Standards. These thirty-one States have approximately seventy-one per cent of the lawyers in this country, and in the final analysis it is through the lawyers that our standards of admission must be raised.

Of course, even in those States where there are no requirements of training, there is still the bar examination hurdle to clear (except in Indiana where in many counties "a good moral character" suffices), and this is of inestimable benefit. In the spring and summer bar examinations of 1929 only fifty-two per cent of the candidates throughout the country passed the bar examinations, and partial statistics covering the last seven years indicate the average number passing has been about fifty-five per cent.¹⁰ The difficulty with this test is that it can be met by cramming and success in it is far from an infallible proof of legal education. Particularly in some of our large eastern States this has given rise to schools or courses of instruction designed solely to enable the student to pass the bar. Another weakness is that it is applied with varying severity and in some States is so easy that eighty or ninety per cent of those taking the examination pass whatever their training. This is probably because of lack of interest or time on the part of those bar

⁸ Colorado, Connecticut, Idaho, Illinois, Kansas, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, West Virginia, Wisconsin, and Wyoming.

⁹ California, Delaware, Georgia, Iowa, Louisiana, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Virginia, and Washington.

¹⁰ Taken from reports in "The Law Student" magazine.

examiners, and it is suggested that some improvement can be made in this situation by circulating the examinations of all the States reciprocally among the bar examiners. Eventually, perhaps, the system of a central board may be evolved which will give examinations for the entire country with a part of the examination reserved for questions to be made up locally with reference to statutory law and local decisions of the State courts.

The progress of the law schools of the country has been more rapid than that of the Standards of Admission. Four more law schools, Furman University School of Law, University of Georgia Law School, University of Maryland School of Law, and the University of Mississippi School of Law, were admitted to the Approved List of the American Bar Association at the January meeting of the Council, making seventy-one schools out of a total of one hundred and seventy-seven which admit only students with two years of college, require three years of study for a degree if full time and four years if part time, and meet the Standards as to library and as to full time faculty members. The adoption of the Standards by the States has the tendency automatically to cause the law schools to meet those standards, but it is to be said to the credit of our law schools that those of the better type have been ahead of our State legislatures and State supreme courts rather than following them.

In view of the present tendencies we cannot sit back in the hope that the situation will work itself out through the influence of these better law schools. We live in a rapid age; things change very quickly, and we must meet those changes as we see them taking place. The law school enrollment and the number of candidates for the bar are increasing by leaps and bounds. We have over 160,000¹¹ lawyers and 51,000¹² law school students. With these rapidly mounting numbers there is added need for a careful scanning of the ranks of the applicants. The more who apply, if our standards are not carefully guarded, the more we will admit who do not live up to that qualification of minimum training to which, at the very least, the public is entitled. And it cannot be denied that this is a responsibility which rests directly on the bar.

¹¹ Count of lawyers listed in Martindale's Law Directory in 1926 showed 163,310 lawyers in the United States.

¹² Estimated.

JUDGE J. A. P. CAMPBELL,
DISTINGUISHED LAWYER, STATESMAN, SOLDIER
AND JURIST

By W. J. PACK*

The subject of this sketch was born in South Carolina in 1830. He was of Scotch-Irish descent. His father, Richard B. Campbell, was a prominent Presbyterian minister, a graduate of Princeton. His mother was a woman of education and culture. She taught her six children the rudiments of reading, writing, spelling and arithmetic.

Judge Campbell, as a child, was unusually precocious. He had no recollection of when he could not read. His mother told him he could read well at four years of age. At five years of age, he was able to answer the 107 questions of the Westminster Shorter Catechism.¹ After attending the common schools of South Carolina he attended Davidson College of North Carolina. In 1845 he moved with his parents from South Carolina, to settle in Madison County, Mississippi.

Young Campbell studied law under Simon Ford, a lawyer of prominence of that day. He seemed to have a natural aptitude for the law, for he was admitted to the bar in 1847, being then only seventeen years of age. He practiced his profession at Kosciusko until after the Civil War.

At twenty years of age he married Eugenia S. Nash, of Attala County, daughter of Rev. W. W. and Nancy Nash, of the Baptist faith. She was an accomplished young woman of rare charm and beauty. Shortly after their marriage he joined the Baptist Church with his wife, to which both remained devout and consistent members, contributing largely of their means and service to the activities of the church. Eight children blessed this union: Charles C., Judge R. B., J. A. P., Jr., Mrs. Minnie Dameron, Newton N., Mrs. Edward Yerger, William Noah and Eugenia; only two are now living, Mrs. Minnie Dameron and Mrs. Edward Yerger, both of whom reside in Jackson.

Like most young men of promise in his day, Judge Campbell had early political aspirations, and at twenty-one

* Member of the Laurel, Mississippi Bar; former judge of the Mississippi Supreme Court; and Circuit Judge of the Twelfth District of Mississippi.

¹ Daily Clarion-Ledger, September 25, 1914.

years of age was elected to the legislature from Attala County, and became Speaker of the House at twenty-nine.

It is said he was a man of attractive and imposing personal appearance, standing six feet two in height. Bishop Charles B. Galloway, himself a native of Kosciusko, in writing to an old friend of early reminiscence, thus describes Judge Campbell's physique: "Among the men at the bar, I remember most distinctly Hon. J. A. P. Campbell, young, tall, erect as a soldier, with long, wavy hair, graceful in every movement and handsome as a picture, the very embodiment of manly dignity and superb ability."

A GREAT LAWYER

Though largely "self-made," Judge Campbell ranked as an outstanding leader at the bar. It is said that he was not only an energetic and thorough student of the law, but was also a great advocate. Throughout his long experience as a lawyer, he reviewed Blackstone at least once every year. For several years before his appointment to the Supreme Court bench, he was associated with Judge Calhoun. Their law office was at Canton. The briefs in the Supreme Court at that time show that this firm appeared in all the important litigation of that section of the State. During the first session of the Supreme Court after Judge Campbell's appointment, he was disqualified in ten of the cases then pending on the docket, by reason of having been counsel therein.² As a lawyer he was considered the equal of Harris, George and Yerger.³

The State University recognized his ability by offering to make him professor of law in 1870, which position he declined. In 1878 the University conferred upon him the honorary degree of L. L. D. After he retired from the Supreme Court, at sixty-five years of age, he was frequently retained by other lawyers in important cases in the Supreme Court.

At a special session in 1894, the legislature, in its desperate efforts to raise revenue, passed a freakish act, directing the State Auditor to issue special warrants instead of cash warrants upon the treasury. These warrants were issued in bills ranging from \$5.00 to \$20.00, payable January 1, 1896. These bills bore such similitude to the "greenback" bills of the United States, that the Treasury Department of the United States Government held them to be a violation of the Federal statute denouncing counterfeiting, and ac-

² 52 Miss.

³ Resolutions of the Supreme Court Bar adopted upon his death.

cordingly, ordered the arrest of the Governor, Auditor and Treasurer. One of the ablest lawyers of the State was employed to prosecute. Judge Campbell was employed for the defense. The Grand Jury, failing to indict, there was never a trial.⁴

At seventy-five years of age, he was still able to handle, with consummate skill, the most intricate problems of the law. The Jackson newspapers carried an interesting story of his appearing at this age before the Supreme Court in the celebrated case of *John A. Knutt vs. Gerard Brandon, Administrator*, involving \$60,000.00.

"Judge Campbell's argument was a masterly summing up of the celebrated litigation and, despite his advanced age, he talked for more than two hours and received the close attention of the members of the Supreme bench. His voice was full, strong and resonant, and the argument demonstrated the fact that his mind, so richly stored with legal lore, had lost none of its brilliancy. He still retains an acuteness of perception and lucidity of statement, coupled with masterful reasoning force, that many younger lawyers with much repute would give a great deal to possess."

He was employed to assist the Attorney General in the case involving the constitutionality of our present primary election law.⁵

During his eighty-fourth year, Judge Campbell was interviewed by a news reporter,⁶ and among other things, Judge Campbell said: "My opinion is often sought by lawyers, which shows that the legal profession considers my faculties not impaired in any way by age."

In early life he formed habits of thrift and economy, made and saved a good deal of money, which enabled him to live comfortably in his old age. It was a habit of his life to refuse to pay postage on mail sent to him. It is related that a lawyer had been paid a thousand dollar fee to write a brief in a case pending in the Supreme Court. Not knowing of this fixed habit of Judge Campbell's, and neglecting to ascertain the correct postage, the lawyer elected to mail his brief direct to Judge Campbell, who, unaware of the name of the sender, or the importance of the letter, on receiving the usual notice of "postage due," refused to pay it. The brief was never filed, and the case afterward decided adversely to the lawyer.

Measured by the time from his admission to the bar at seventeen, to his death at eighty-seven, he was seventy years a lawyer. Probably the oldest lawyer in the United States.

⁴ Roland "The Heart of the South," Vol. 2, page 261.

⁵ 80 Miss. 617.

⁶ Jackson Daily News, January 11, 1914.

STATESMAN AND SOLDIER

Judge Campbell distinguished himself for his statesmanlike service in the legislature, both as a member and speaker of the House.

In 1861 our State was passing through the darkest chapter of her eventful history; a constitutional convention had been called to assemble. Its chief purpose was to determine if Mississippi should secede from the Union. It can truthfully be said that for learning, ability, patriotism, and nobility of character, no superior body of men had ever before, or has ever since been assembled within our borders. Among its "luminaries of the first magnitude in the legal firmament," were Judge Wiley P. Harris, L. Q. C. Lamar, J. Z. George, Brooks, Marshall, Yerger, the two Claytons, Barry, Glenn, Clapp, Ellet and Alcorn. With these there were other men of distinction in various callings and professions. In writing of this convention, Judge Thomas H. Wood, for years an eminent member of our Supreme Court, says: "The tremendous responsibility resting upon the convention was seen on every countenance. From Judge Harris, solitary, silent, introspective, and Lamar, brooding, abstracted and melancholy, downward through all ranks and classes, was an air of fixed solemnity."⁷ Having taken the momentous step of adopting the ordinance of secession presented by Mr. Lamar, as Chairman of the Committee, the Convention proceeded to select seven delegates to attend the Congress of delegates from seceding States, soon to meet at Montgomery, Alabama, for the purpose of forming a provisional government for the Southern Confederacy, and framing its Constitution. Judge Campbell was one of the seven. To be chosen by such a body of men, upon such an exalted mission, was the highest expression of confidence in his ability, loyalty and statesmanship. At this time Judge Campbell was just entering his thirtieth year, and was the youngest of the forty-nine famous men composing that memorable body. In speaking of these men,⁸ Judge Campbell said: "I doubt if there was ever an abler body assembled since the formation of the Constitution of the United States," mentioning as his co-workers, such men as, Howell Cobb, Alexander H. Stevens, Toombs of Georgia, Tom Cobb, Ben Hill, Wiley P. Harris, Crawford and Barnwell. In the same interview he further says: "Contrary to the generally accepted opinion as to the leisurely methods of the times, the Confederacy's law-

⁷ Publication Mississippi Historical Society, Vol. 6, page 91.

⁸ Jackson Daily News, January 11, 1914.

making body was a hard-working lot. Sessions were held throughout the morning and afternoons, and sometimes late into the evening. When we met at Montgomery it was not our intention to destroy the Constitution of the United States, as many charged, and this charge was base and false. We took the Constitution of the United States as our guide, and ever upheld it."

For many years prior to his death Judge Campbell was the sole surviving member of the forty-nine whose names were subscribed to the Constitution of the Confederate States.

In 1875 he was selected as a member of the Committee headed by J. Z. George to rout the miserable Carpetbaggers and re-establish democracy. The wisdom, courage and persistence of this Committee made it possible to free Mississippi of the worst scourge that ever afflicted a liberty-loving people. No greater service was ever rendered, no higher duty was ever performed.

After the organization of the Confederate Government, Judge Campbell returned to Mississippi and joined the Confederate Army, in March, 1862, when he became Captain of Company K, Fortieth Mississippi Regiment. Upon the organization of the regiment, he was chosen Lieutenant Colonel. The regiment was assigned to General Hebert's brigade, General Little's division. He participated in the battle of Iuka, and was in the battle of Corinth, when fighting at the head of his Command, he was wounded, but was soon able to regain his regiment at Grenada, where the forces of the South were confronting Grant. He was at Vicksburg before the siege, and while there, received notice of his appointment by President Davis to the rank of Colonel of Calvary and assigned to duty as a member of General Polk's staff, which position he held until the surrender.

A MAGNETIC ORATOR

Not only was Judge Campbell an able lawyer, a profound jurist, brave soldier and eminent statesman, but he was also a popular and magnetic orator, and was much in demand as a public speaker, especially before he was appointed to the Supreme Court. In his autobiography, written by himself for his descendants shortly before his death,⁹ he says: "Before the War Between the States, the Fourth of July was annually observed in Mississippi, and barbecues were had all over the land. I was invited to deliver the oration at the Kosciusko barbecue on the Fourth of July,

⁹ Clarion-Ledger, October 22, 1914.

1848, and was several times afterwards engaged in like manner in Attala and Leake County. I frequently delivered an address before a school at Commencement exercises." He was Presidential Elector and supported Horace Greely for President in 1872. He made several speeches in this campaign. At a grand Greely rally at Holly Springs, attended by over seven thousand people, Judge Campbell seems to have been the principal speaker, and electrified the crowd by his eloquent plea for peace, fraternity and good will.

The Commercial Appeal's report of the meeting thus describes his appearance on this occasion: "The first speaker introduced was Judge Campbell of Canton. Judge Campbell is a man of imposing appearance, something above medium height, possessing a clear, ringing voice, which was easily heard by the entire throng. He is an easy and pleasing speaker, with a remarkable flow of choice language." A shocking situation existed in Mississippi at this time. Reconstruction, with all of its woes, was afflicting the people of the South, and especially had the people of Mississippi suffered under carpetbag rule. Note his fearless arraignment of those responsible for such conditions. In deploring the apathy and coolness of people toward the Government, he asked: "Why should such coolness characterize this sunny land? . . . Why is it that ministers of the gospel proclaim the truth to empty benches? Why is it that everything in the land lags and seems to retrograde? Why is it so with the thousands of the lately enfranchised? It is because of the corruption in high places, of the utter rottenness of the different departments of our Government, of the absence of moral rectitude in those who at present misrepresent the people. It is a verification of the scriptural phrase, that when the wicked rule the land mourneth. That Government which should have poured out blessings on the head of every citizen of this republic, has proved a curse. . . . At present, industry languishes throughout the land and it is with a feeling akin to distrust that we regard it. Sectionalism has, in the main, been the cause of this sad and deplorable condition. It culminated in 1861, when a sectional man was placed in the Presidential chair. The people became alarmed and the consequences was four years of bloody war and internecine discord, until in 1865, the Confederate banner, the hope of thousands, went down and was lost forevermore; but when it did go down, it was surrounded by a halo of glory that commanded the admiration of the habitable world. When all was lost the noble southern

was ready to transfer his allegiance to the general government. That noble patriotism which found echo in the breasts of thousands of the best, noblest and bravest of the sons of the South; that same patriotism which prompted the hardy sons of the north and the western prairies to buckle on their armor and go forth to do battle for the honest conviction of his conscience, and also inspired the Confederate to fight unto death for his honest convictions, and was ready to be transferred to the Government of the Constitution." He then eloquently pleaded that the surest way for restoration of peace and harmony was for all to cooperate in the support of Greely.

In 1858 Judge Campbell delivered another notable address at Kosciusko, upon the Public Life and Character of the Lamented Ex-Governor John A. Quitman. At this time Judge Campbell was only twenty-eight years of age. The address made such an impression upon the hearers, that a number of them joined in a written request for its publication. The Attala Democrat published it in full. Even at this age he showed that remarkable faculty for concise expression of thought, so noticeable in his written opinions. In describing the statesmanship of Governor Quitman, he used language that we could aptly apply as descriptive of himself:

"Gen. Quitman was a great statesman. He was not a mere politician, in the common acceptation of that much abused term, acquainted with newspaper lessons of political science and familiar with the tricks of parties and the slang of party warfare, but was a statesman in the true sense of that term. He was a man of profound thought and of well trained mind—a thorough lawyer, familiar with the fundamental principles of constitutional construction, and eminently qualified to grapple with the most difficult questions of governmental policy. A statesman, he never thought of sacrificing principle to present expediency, as is too frequently done in our country. A bold man, he was not disposed to dodge any question through fear of the consequences of meeting it. A patriot, his personal ambition was always laudable, and was subservient to the good of his country. An ingenious man, guided by principles, having a reason for his motives and actions, clinging to truth as his polar star, he had no concealment, but was ever ready boldly and frankly to avow his real sentiments. He was not afraid to advocate any sentiment his judgment approved and never sought to conceal the consequences likely to result from the measures he advocated."

Another oration disclosing his oratorical ability was delivered at Canton in 1874, on "The Lost Cause." The occasion was Confederate Memorial Day. The town was at that time occupied by Federal soldiers, during the Freed-

man's Bureau regime, but this did not deter him from delivering an eloquent and powerful defence of the cause of the Confederacy. Pen never wrote, nor tongue ever uttered a more beautiful tribute to the southern soldier, and a truer and greater defence of his cause, than is portrayed in this address. It was reproduced and published in the *Daily Clarion*, February 23, 1887. It would do violence almost, to wrench an excerpt from the address. To fully appreciate its beauty, one must read it in its entirety. The writer cannot resist quoting one paragraph:

"Though a lost cause,—though branded by authority of the victor as treason and its followers as traitors,—I for one am not ashamed of it. My holiest memories cluster around it. No power can storm the fortress of a resolute heart. When the Confederate banner was furled, we as Confederates, in sadness accepting the result, while weeping bitter tears of unfeigned sorrow and experiencing the poignancy of keenest grief at the termination of our efforts and disappointment of our fond hopes, in good faith assumed allegiance to our present government, and have maintained it; but it would be hypocrisy to pretend it was by choice, as it is treason to the memory of our gallant dead to confess the heart-condemned falsehood that our cause was not just. Our cause was just, our purpose honorable and upright, and attempted to be maintained by as noble a band as ever struck valiant blows for freedom and right. Falsehood cannot blacken it; malignity and calumny cannot disgrace it; misapprehension cannot dishonor it. It can never become odious until the men and women of the South forget what they owe to the memory of the gallant dead. Can this day ever come? Never, while the highest virtues of manhood find worshippers. Patriotism will always command respect. It is a principle inseparable from ourselves as social beings. Heroism excites admiration, wherever displayed. It demands and receives tribute from the human heart, even though exhibited by the savage Modoc. When beheld in upholding the right, admiration swells into enthusiasm. We but do honor to the nobler impulses of the soul, in cherishing with grateful and affectionate remembrance the memory of our sleeping heroes, and are only true to ourselves, in annual commemoration of their sacrifices, by decorating their nameless graves. They were patriots. They loved their country and died for it. They were heroes, and displayed their heroism in gallantly striving to maintain the right."

In 1890 Judge Campbell was invited by the legislature to deliver an address at a joint memorial session on the life and character of Jefferson Davis. How well he acquitted himself as an orator is evidenced by the wide publicity given this speech by the press of the country. The legislature ordered the address printed and the same is preserved in pamphlet, copies of which may be found in the State Library

and in the libraries of the University, A. & M. and M. S. C. W. As an example of his style at this time, being now past sixty years of age, two excerpts are quoted. In speaking of the courage of Mr. Davis, he said:

"His courage was sublime.

"I speak not merely of the sort of courage that enables one to bear himself well on the battlefield. Most men have that. But have reference to that high moral courage based on truth, and faith in the right; that moral virtue, which sustains its possessor under all circumstances and prompts and enables him to follow his convictions of duty in the face of a frowning world, if need be.

"He had a lofty contempt of everything low and mean. His methods were all direct, open and manly. He was incapable of truckling, he did not know how to act the small politician. He had faith in the triumph of right. He was governed by principle in his actions, and depended on his high character, and public appreciation of it for his success. His public and private life was pure; his conduct always upright. He was always truthful, honorable, brave, faithful, and consistent in its maintenance of the right as he viewed it.

"A distinguishing feature of his character, and the most prominent one, was his devotion to duty. Duty was his inspiration and guide. Where it pointed, he followed, whatever the sacrifice, or the peril. He left his pleasant seat in Congress to lead Mississippians on fields of carnage, in a foreign land, in obedience to its behest. When severely wounded in battle, he remained in command all day. He resigned a full term of six years in the Senate of the United States, to be the candidate of his party for an office he did not desire, and in the face of the strong probability of defeat. So, when he accepted the presidency of the Confederate States, with its exacting duties and perplexities, **no man had a higher sense of duty.** He consecrated his life, and devoted all the energies of his earnest nature to the service of his country.

"His conception of public office was, that it is a public trust—a place to render the very best service he could—to do duty for his country and he toiled assiduously, and unremittingly for this purpose, and with this high resolve, animating and sustaining him.

"There was never a more faithful servant, and this imports far more than is generally understood; for the multitude has little conception of the corroding care; the consuming anxiety; the pressing and almost crushing sense of responsibility, and the ceaseless effort of him who is entrusted with great responsibility, and is fit for it, and worthy of it. They may throw care aside, when the day's business is over, and sleep sweetly and soundly in knowing nothing of the perturbed hours and disturbed rest of those in public positions of great responsibility, on whose sufficiency and fidelity the welfare and happiness of society largely depends. The many are patriotic, undoubtedly, for it is their

interest to be. There has been, and there is, such a thing as patriotism as the chief inspiration to holding office. There are those who hold office to serve their country, surprising as this announcement may now be regarded by many.

"Though the multitude were reproached for following Christ, for the loaves of which they had eaten, there were yet some who sought Him from higher motives than the loaves and fishes. Though of the ten lepers healed by Him, nine failed to return to give Him thanks, that was His due and their duty, there was one, who was mindful of his obligation. And although the per centum of those actuated by proper motives and mindful of their just obligation may still, as of old, be small; there are yet some, who desire public office to render service to their country; and Mr. Davis was a conspicuous example of this, small class, it may be, but which certainly exists."

Referring to the vicarious suffering of Mr. Davis, Judge Campbell continued:

"He gave his life for us. He was a vicarious sufferer for the whole South. He bared his bosom, and received in his person, as our representative, the envenomed hate of the North. It was on our account he was imprisoned. For us he wore manacles! Because he was our chief, chosen by us for his exalted position, he was reviled, traduced, denounced and pursued as the chief of malefactors. Every venomous shaft hurled at him was aimed at us. He was simply our representative, abused because he was such. His life was part of the history of the Confederate struggle. Because he survived the Confederacy, and proudly maintained an unrepentant attitude, refusing to sue for pardon or seek relief from political disabilities, he continued, long after the war was over, to provoke bitterness of large numbers of the people of the North, who never lost an opportunity to assail him. The injustice of this is manifest, for, if he chose to remain under political disabilities and asked no favor, none had any just cause of complaint."

Judge Campbell's unusual gift in the portrayal of character is probably explained by the nobility of his own character, which enabled him to see and describe the beauty of character in others. His speech at the memorial service of the bar upon the death of Judge Wiley P. Harris is a striking proof of this gift.¹⁰ Of the many characteristics of this nationally famous lawyer, depicted in this masterful oration, Judge Campbell said:

"He was a jurist of the very highest order, but not a legislator—a lawyer and not a law-giver—an expounder, not an originator—able to pass on the creations of others, but not himself a creator.

"He once remarked to me that he had never originated anything. His capacity and tastes were not in that direction. He

¹⁰ Daily Clarion-Ledger, January 7, 1892.

was not an orator. With a fine person, splendid intellect, choice vocabulary and master of a vigorous style, he was not a popular speaker for the masses, and he knew it, and did not often embark in that field of effort.

"He was a model in the court room—there he was at home. His tastes and habits and acquirements fitted him to shine in that sphere. His bearing towards court and counsel and his dealing with the subject before him were admirable, and when the court did not agree with him, and he lost, he used the customary privilege of defeated counsel sparingly and with discretion. He admitted the possibility of the court being right and himself wrong. His service as a judge in his early professional life probably moulded his professional character by begetting the habit of looking carefully at both sides of his case. He did not jump to conclusions, but reasoned to them; was quick of perception, but did not possess intuition or anything resembling it. He was a thinker, and required time for thought—reflection. He did not, like some, see everything he could ever see in a subject, at a glance, but with opportunity for reflection he saw more than they. His power of generalization was remarkable, but he did not elaborate details as some men do. There were members of the profession, his contemporaries, superior to him in the matter of details. He was the acknowledged leader of the bar of the State—whose unchallenged pre-eminence was so generally recognized as not to excite envy. His position at the bar was unique, envying no one, envied by none—without rivalry or jealousy. In all my association with him, I never heard him disparage another. He was not profuse in praise—not much given to laudation of men, but he was even freer from carping envy. He could afford to be liberal. His own recognized position was such that complimenting his fellows did not in any way endanger himself, but this was not the inspiring cause of his course in this respect. It sprang from his sense of justice, which was as strong in him as in any man I ever knew. He was honest, upright, just, eminently so. He did not belong to those who are afraid to do justice to others lest they detract from themselves; or who selfishly regard all praise bestowed on others as so much subtracted from what in their view is due themselves. He was far removed from that class. He was tolerant of the views of others, and wise as he was, could and did accord to others their dues."

CODIFIER OF LAWS

Two of the Codes of Mississippi, the Code of 1871, Mississippi's tenth Code, and the Code of 1880, Mississippi's eleventh Code, bear the name of J. A. P. Campbell as Codifier. He was appointed as one of the three commissioners in 1870 to "revise, digest and codify the laws of the State, to propose such alterations thereof, and such new laws as they may deem expedient." The work of the com-

missioners was completed and the new Code submitted to the legislature for adoption. This was under the Carpetbag rule of Mississippi, and Judge Campbell says the work of the Commission was marred by an incompetent legislature.¹¹ He was never satisfied with this Code, and it did not meet with the approval of bench and bar. It was the first Mississippi Code, however, in which the sections thereof were numbered consecutively throughout the volume. In this respect it was a recognized improvement over former Codes, and the plan has been followed in all subsequent Codes of our State. The legislature of 1878 provided for the compilation of a new Code, and authorized Judge Campbell, then one of the Supreme Court Justices, to perform this arduous duty. In January, 1880, he had completed the work and submitted the same to the legislature. It was adopted with but few amendments. He was further authorized to superintend its publication, supervise its orderly arrangement as to chapters, sections, citations, index, etc. The Code, when published, was virtually the sole and complete work of Judge Campbell, and stands as a great monument to his ability as a law-giver.

This Code abounds in many needed reforms in our statutory laws. It contains practically two hundred original sections, written by Judge Campbell, none of which were ever held unconstitutional. This Code contains the first statute enacted in the United States abolishing dower and curtesy, and the first to completely emancipate married women from the common law disability of coverture. It also contains many reforms in the tax laws resulting in vast saving to the State, and it radically reformed our court procedure. Other wholesome reforms carried in the new Code were: (1) The almost complete abolition of estates in joint tenancy and entirety, a new section declaring that all conveyances and devises of land to two or more persons jointly, even to husband and wife, should vest title in such grantees or devisees as tenants in common, unless otherwise expressly provided by grantor or devisor. (2) Enabling creditors to set aside conveyances fraudulently made by debtors to hinder, delay and defraud them before their debts had been reduced to judgment. (3) The abolition of private seals and the extinguishment of all distinctions between sealed and unsealed writings.¹³ Judge R. H. Thomp-

¹¹ Autobiography *supra*.

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¹³ Judge R. H. Thompson on Codes of Mississippi, paper read at State Bar Association, 1926, page 44 Proceedings.

son relates¹⁴ some interesting reminiscences touching some of these reforms. It is said that former Chief Justice Peyton, of our Supreme Court, recognized by many lawyers of his day as being more learned in the common law than any Judge who ever presided in that Court, strenuously objected to the abolition of private seals. Addressing Judge Campbell he said: "You have ruthlessly destroyed all the learning of a century on the subject of seals; I have spent many years of my life endeavoring to master the subject and now, sir, you have thrown the fat in the fire." To this Judge Campbell replied, "Judge, there is nothing in the world to prevent you continuing your studies of the law of seals to the end of your life and I trust, sir, your study of the subject will be interesting." When another old lawyer of that day first read the new section abolishing private seals, he was heard to utter the following soliloquy:

"Beneath this lies all that remains of *Lucus Sigilli*, a character of ancient date, whose mission was to give peculiar solemnity to documents. Emigrating to this State in its earliest days, he served his day and generation to a good old age, and was gathered to his fathers, generally mourned by the members of the legal profession. He left surviving him only one relative, now in the keeping of corporations. Obit November 1, 1880. His last request was that this epitaph should be under Seal. (L. S.)"

When the same old lawyer read further in the new Code and was amazed to find that Dower and Curtesy had been abolished, he thus soliloquized:

"Venerable relics of antiquity, you have come down to us from a former generation. You have survived the wreck of empires and change of dynasties. Born away back in the womb of time, whereof the memory of man runneth not to the contrary, you have outlived the War of the Roses, passed safely through the Protectorate, crossed the ocean, survived the great American Revolution and rode out the storm of the late War Between the States. Whatever attendants were absent from the bridal altar, you two at least were always there; and when the bride and groom murmured, 'with all my worldly goods I thee endow,' you as priest and priestess sealed the covenant. Like shades, you followed the twain blended into one and when either fell, one of you administered the balm of consolation to the survivor. If pure religion and undefiled be to visit the fatherless and the widow in their affliction, thy mission has been akin to it. Venerable priest and priestess of the common law, farewell! You have been pleasant in your lives and in death hath not been divided."

The preparation of this Code was a noble work for both Judge Campbell and the State, and has written his name in unfading letters upon the list of those whom we love to

14 Proceedings State Bar Association, *supra*.

honor and admire. "Judge Campbell was the author of more legal reforms than any other lawyer, judge or legislator in the State."¹⁵ Former Chief Justice Whitfield paid him this deserved compliment:

"The most radical legislation this State has perhaps known was that part of the Code of 1880 abolishing dower and curtesy, emancipating married women from the disabilities of the common law, abolishing private seals and all obsolete doctrines connected with them and simplifying and perfecting the system of pleading, and the forms of conveyances of land. Every one of these reforms was tremendously radical, but is there an intelligent man in the Commonwealth who would hesitate to say that every one of them was pre-eminently wise? The great thinker and profound lawyer who prepared that Code, and secured those changes in the body of the law, did not stop to inquire whether they were radical. Finding them needed and wise, he secured their adoption; and their adoption will constitute, while we have a jurisprudence, a large part of the fame justly gathered about his name as a great lawyer and a great judge. It took wisdom to frame these reforms, and ability and courage to secure their adoption. It was the good fortune of the people of Mississippi that he had all three of these qualities in supreme degree."

A PROFOUND JURIST

Eminent as a statesman, valiant as a soldier, eloquent as an advocate, and wise as a law-giver, it was as Judge of the courts of our State that Judge Campbell ranked co-equal with the most illustrious sons of Mississippi.

In Deuteronomy we read, "And I charged your judges saying, Hear the causes between your brethren and judge righteously between every man and his brother and the stranger. Ye shall not respect persons in judgment; but ye shall hear the small as well as the great."¹⁶ One of the sages has said that "A judge should hear courteously, answer wisely, consider soberly, and decide impartially." It may be truly said that Judge Campbell's judicial career was founded upon these precepts. He came to the Circuit Court bench in 1865, after the close of the Civil War, being elected in the Kosciusko district. He was re-elected without being a candidate, but in the meantime, the Federal Government had prescribed the oath of allegiance, which he was unable to take. For his district attorney he had Col. Sol S. Calhoun, afterward a distinguished Supreme Court Justice and president of the Constitutional Convention in 1890. A clip-

¹⁵ Proceedings State Bar Association 1909.

¹⁶ Deuteronomy 1:15-16.

ping from a Kosciusko newspaper thus refers to a term of court held by Judge Campbell:

"His Honor, J. A. P. Campbell, has been presiding with his usual splendid ability as a lawyer and a judge. Indeed it may be said without the fear of successful contradiction, that the charge of Judge Campbell to the Grand Jury, at this term of the Court, was the ablest and most thorough ever delivered in the State, and that its effect upon the community was very fine. Col. Sol Calhoun, the accomplished District Attorney, has been on hand, faithfully discharging his duty."

Judge Campbell came upon the Circuit Court bench at a time of great confusion due to the problems growing out of the overthrow of the Confederacy. State currency was of doubtful status; business transactions, including credits and debits predicated upon law and authority were all involved because of the failure of the war. Confusion worse confounded was further injected by the misconceived and mischievous thrust of the Freedman's Bureau, with its assumed jurisdiction over race and labor questions. Notwithstanding these and many other difficulties, the judges of the old South, of which Judge Campbell was an outstanding example, rendered invaluable service in upholding law and order.

Upon the signal victory of Democracy in the memorable campaign of 1875, home rule was re-established. John M. Stone was now Governor. The Supreme Court in 1876 was composed of H. F. Simrall, Ephriam G. Peyton, both old citizens of the State, and Jonathan Tarbell, a Union soldier from New York, who had settled in Scott County after the war. Peyton and Tarbell were Republicans, all three being appointees of Governor Alcorn, under the Constitution of 1869. From 1833 to 1870, our highest appellate court was known as "The High Court of Errors and Appeals." The Constitution of 1869 created a "Supreme Court" of three judges, to be appointed by the Governor, by and with the advice and consent of the Senate. The State was divided into three districts and a judge was to be appointed for each district, but might come from any part of the State. The term was to be for nine years, but to begin with, the terms were to be respectively for three, six and nine years. In drawing for terms, Judge Simrall drew for nine years, Peyton for three, and Tarbell for six years.¹⁷ The Court elected Peyton as Chief Justice, who resigned and was succeeded by H. H. Chalmers in 1876 for the remainder of the Peyton term, when Judge Simrall was made Chief Justice. On May 10, 1876, Judge Tarbell's term expired and Gov-

17 Roland "The Heart of the South," Vol. 2, page 449.

ernor Stone appointed J. A. P. Campbell. The appointment of Judge Campbell came unsolicited and unexpectedly. Thus began eighteen years of service on the Supreme bench, for at the end of his first term he was re-appointed by Governor Lowery. Judge Campbell was a member of the Supreme Court in continuous service longer than any other member since its creation, with the exception of our present able Chief Justice Sidney M. Smith, who is now serving his twenty-first year, comparatively a young man and in perfect health. Judge Campbell was twice Chief Justice. The Code of 1880 provided that the Judge whose term was first to expire should be the Chief Justice. Judge Chalmers had become Chief Justice under the act. His term expired in 1882, and although re-appointed, the law operated to make Campbell Chief Justice. His term expiring in 1885, and being re-appointed, made way for Judge Cooper to become Chief Justice, who, in the meantime, had been appointed to fill out the unexpired term of Judge J. Z. George, resigned to enter the United States Senate. James M. Arnold was appointed in 1885 to fill out the unexpired term of Judge Chalmers, deceased, and in regular order immediately became Chief Justice. Upon the re-appointment of Judge Wood, in 1891, then Chief Justice, Judge Campbell again became Chief Justice. The Code of 1892 changed the plan, since which time the Judge of the longest continuous service on the bench becomes Chief Justice.

During Judge Campbell's first two years on the Supreme bench, its personnel was Simrall, Chalmers, Campbell; the next three years: George, Chalmers, Campbell; the next four years: Arnold, Cooper, Campbell, and the remaining three years of his tenure, Wood, Campbell and Cooper.

Lawyers will perhaps differ as to which of these periods of time our Supreme Court had the highest rank. I venture to state, however, that all lawyers will agree that during the entire eighteen years of Judge Campbell's tenure, the Court would compare favorably with any Supreme Court of the United States. The opinions for this 18 years' period fill nineteen volumes of our Reports, 52 to 70 inclusive. In these opinions we find reflected the style, the character and the wisdom of the individual Judge. What a galaxy of legal luminaries! Although all have finished their course and gone to their reward, their opinions live on and will continue as torches to light our legal pathways. For elegance of style, for grammatical accuracy and rhetorical beauty, the opinions of Chalmers and Wood are outstanding. The opinions of these two distinguished Justices, if segregated

and bound in separate volumes, would, within themselves, be interesting and instructive legal literature. Whereas the opinions of Judge Campbell would be incomplete unless accompanied by the reporter's statement of the facts. The opinions of Judge Campbell have been subjected to some criticism by the bar because of their brevity and his habit of leaving it to the reporter to state the facts. But for clarity of thought, conciseness of expression and soundness of decision, the opinions of Judge Campbell are excelled by none. His opinions probably announce more law in the fewest words than those of any Judge who occupied the Supreme bench prior to and during his tenure. Lowery and McCardle's history of Mississippi says of Judge Campbell: "It is no disparagement to others to say that no abler man ever adorned the Supreme Bench of Mississippi."

The character of cases mostly occupying the courts of Judge Campbell's day were, as a rule, different from those of today. There were no suits growing out of the operation of automobiles. In fact, there were very few damage suits. An entire volume of reported cases during his tenure will show no cases listed under the title of master and servant.

Possibly the most celebrated case decided during Judge Campbell's long tenure was *Jefferson Davis vs. Bomar, Executor, et al.*, 55 Miss. 671. This case was a controversy between Jefferson Davis, Ex-President of the Confederacy, as complainant, and against some of the heirs and devisees of his deceased brother, Joseph E. Davis, and against grantees under a deed made by said decedent. Jefferson Davis claimed title by parol gift and by adverse possession to "Brierfield," a large plantation in Warren County. The record title to the land had always been in Joseph E. Davis. Jefferson had occupied "Brierfield" for many years—more than ten—during the interim when not engaged in public service. Joseph executed a deed conveying "Brierfield," together with "Hurricane," his home plantation, shortly after the surrender, to Benjamin P. Montgomery and his two sons, Isiah and T. W., these grantees being negroes and former slaves of the Davis family. The purchase price was \$300,000.00, payable nine years after date, with interest at 6%, payable annually. At the date of the execution of this deed, Jefferson Davis was a prisoner of the Federal Government, confined at Fortress Monroe. Joseph E., prior to the Civil War, was a prominent planter, a former lawyer, and had amassed a large fortune. Subsequently to the execution of the deed Joseph E. Davis made his will, in which he named the children of his brother, Jefferson, as

some of the devisees, making to them a liberal devise. The will expressly included, as part of the assets, the Montgomery notes. Jefferson was named as one of four executors. Upon his returning to Mississippi, he qualified as one of the executors of the will and for a few years prior to the suit assisted in the execution of the will. Pittman and Pittman, able lawyers of that day, represented Jefferson Davis and Harris and George appeared for the defense. The decision of the case turned upon three questions: (1) Was Jefferson Davis the legal owner of "Brierfield"? (2) Has his conduct been such as to estop him from claiming its proceeds? and (3) Does his position as executor debar him from asserting his rights? Each member of the Court, Judges Campbell, Chalmers and Simrall, wrote masterful opinions, replete with logical and powerful reasoning. The case was decided favorably to Mr. Jefferson Davis. Chief Justice Simrall wrote the dissenting opinion. The case is interesting from the viewpoint of history and human interest, as well as the legal points discussed and decided. The reported case sets out the testimony of the witnesses, some of whom were negroes recently freed from slavery, and their language is typical of slave dialect, and some were prominent citizens, including distinguished members of the Davis family. "Resolved, that the dissenting opinion is sounder and supported by better reasoning and authority than the majority opinion," would probably prove an interesting subject for debate by a law class.

The writer did not come to the bar until after Judge Campbell's retirement, but older lawyers relate that whatever his written opinions might lack because of brevity, was fully supplied by his impressive voice and manner of delivery of his oral opinions. As illustrative of this wonderful magnetism, we quote from a newspaper comment of one of these old-time lawyers:

"I was present in the Supreme Court room at Jackson, when the Chief Justice read his opinion in a case where the defendant had been convicted in the lower court of murder. On his trial he had offered evidence of an alibi, but the trial judge instructed the jury that evidence of an alibi was one that could easily be fabricated and that the jury should regard the evidence with suspicion.

"Chief Justice Campbell was apparently six feet or more in height, with coal black hair and long beard, and was as magnificent a specimen of manhood as I had ever seen. As he read the opinion of the court he stretched himself to his full height, his voice was clear and his eyes snapped as he said: 'The defense of an alibi is a legitimate one and the evidence of the alibi should

be left to the jury without any instructions from the court calculated to throw suspicion upon it. The judgment of the lower court is reversed and this case remanded for a new trial.' As he spoke the last words his voice rang out like the blast of a trumpet until the court echoed and re-echoed."

Upon Judge Campbell's retirement from the Supreme bench in 1894, appropriate resolutions were adopted by the bar, not only at Jackson, but in several Counties. Honorable T. A. McWillie, noted lawyer of Jackson, was one of the lawyers who delivered an eloquent address on the presentation of resolutions before the Supreme Court. Among other things Mr. McWillie said:

"If we have to deplore the loss to the public service of one the results of whose talents, learning and industry stand like a supporting arch in the temple of our jurisprudence; if we have to regret that we are not longer to enjoy an association that has taught us how wisdom may be tempered by courtesy and good will, and greatness lose none of its majesty in the intimacy of friendship; we have yet the rare pleasure of observing the close of a judicial career that lacks nothing of completeness and to which honor and usefulness have added every adornment.

"This is high praise, but it is based upon facts, facts that we love to dwell upon and that we are not content to leave to the reporter of the events of our time; and I feel moreover, in referring to them that we need apprehend no suggestion of error from any quarter where learning, dignity, independence and true worth of character have their proper recognition."

HIS HOME LIFE, OLD AGE, AND DEATH

In recounting the achievements of our distinguished men, we too often fail to notice the sacrificial love and influence of the good wife in the home, as the chief inspiration of the man. Judge Campbell graciously acknowledged the help his wife had been to him: "My darling wife was an important factor in my success. She was a member of an influential family and herself exceedingly popular, which contributed much to my early advancement," was a part of his last written message to his children and grandchildren.¹⁸ Her death after fifty-six golden years of unbroken companionship added to the loneliness and sorrow of his old age. Her memory remained vivid and sacred to him. In speaking of her to his children, invariably it was "Your precious mother." From her he had no confidences or concealments. To her he unbosomed all the sacred secrets of his generous heart. He sought her judgment and approval of his every plan and purpose. The beautiful tributes,

¹⁸ Autobiography, *supra*.

spoken and written of her evince the esteem in which she was regarded by those who knew her best. Miss Kate M. Power, eminent as a writer, paid eloquent tribute to her memory.¹⁹ Would that space permitted us to quote more than excerpts from this beautiful tribute:

"A life at once so simple and so strong; in which was mingled in such ideal proportions abiding faith, a hope that knew no limit and a charity that encompassed all who needed its compassion!"

"To those who knew her best no thought can come of any time when she was not a Christian. Her religion was her life, and it grew in sweetness and in strength until it had attained almost unto perfection."

Of the sacrificial service of this splendid woman Miss Power said:

"No task was ever too hard; no sacrifice too great; no journey too long for her, if it could avail to serve a friend."

Of the devotion to her distinguished husband the tribute proceeds:

"Surely she had done for him, who has been her first and dearest earthly thought through all their married years, 'only good, all the days of her life,' and even beyond. For the memory of her must sweeten his sad heart as a flower whose fragrance is immortal."

The legislature recessed to attend the funeral of Mrs. Campbell; of this incident it was said:

"Standing, rank on rank, in the great Church's rear, were the members of the legislature, there, officially, as a mark of honor. And, while their presence would have pleased her, (could she know), because it was a proof of that high place in which men hold her husband, and it would not have pleased her more than did the presence of a group of little ones from the Baptist Orphanage—now motherless anew since this good friend is gone."

"But, among the many causes for quick-starting tears and aching hearts, none touched us more deeply than did the grief-blanching faces of the sightless 'little ones' who, since Mrs. Campbell's first coming to Jackson, have known her for their truest friend and helper. It verily seemed to me, as the tears fell in quick succession from the eyes of one of these blind girls she had loved, that her gentle hand must reach down from on high to wipe the tears away!"

Judge Campbell came into old age through many sorrows, although he philosophically balanced these against his many blessings, and was not embittered or disappointed. His last days were spent under the kind and devoted ministrations of his beloved daughter, Mrs. Minnie Dameron, with whom he lived after the death of his wife. He was frequently interviewed by news reporters, and men of re-

¹⁹ Clarion-Ledger on death of Mrs. J. A. P. Campbell.

noun. On one occasion he was interviewed by Dr. Frederick Bancroft, historian and a writer of note from Washington City. After the interview Dr. Bancroft stated that he regarded Judge Campbell as one of the truly great men of the South, and deplored the fact that a stenographer was not kept employed to take down Judge Campbell's opinions on matters past and present.

Death came to Judge Campbell on January 10, 1917, within two months of his eighty-eighth birthday, after a few days of illness. At nine o'clock on the day of the funeral, all six members of the Supreme Court, with the clerical staff, together with a large array of lawyers, met at the late home of the departed jurist, and with a number of Confederate veterans, formed an escort of honor, accompanying the hearse to the State Capitol, where the body lay in state for five hours, during which time throngs of friends filed by to view for the last time the patriarchal features of the "Grand Old Man of Mississippi."

Funeral services were held in the First Baptist Church, after which the body was placed in Greenwood Cemetery beside the grave of his beloved wife, whose going preceded his by more than ten years.

To such men of which Judge Campbell was an outstanding type, this generation owes a debt of everlasting gratitude. It is fitting that we take time to recall their courage, their sacrifice and their achievements; our society, our peace, our happiness and our civilization itself, stand as monuments to their heroic deeds. In honoring them, we honor ourselves.

IN MEMORIAM*

The annual memorial services were held according to the custom of some years before the Mississippi Supreme Court on its convening September 8, 1930. After the opening of Court, Hon. D. W. Heidelberg, Chairman of the Mississippi State Bar Association Committee, was asked by Judge Smith to take charge.

Memorials were read with respect to the following members of the Bar:

ROBERT SITMAN STEWART, of Liberty, who was born in Greensburg, Louisiana, February 15, 1880, and died March 24, 1930, having been admitted to the Bar in 1902. His wife and four children survive him. Mr. Stewart was serving as State Senator at the time of his death, representing Amite and Wilkinson counties, and was an able and capable lawyer.

LEROY PERCY, of Greenville, who was born in Washington County during the Civil War and died in December, 1929, a citizen of Greenville, Washington County. A quotation from the resolutions read before the court is appropriate here:

"LeRoy Percy was a native of Washington County, Mississippi, the son of a distinguished father, the late Colonel W. A. Percy, a gallant soldier, a wise statesman, a great lawyer and a most excellent gentleman. His mother was Nannie Armstrong Percy, one of the South's noble women. He attended the public schools of Washington County and graduated at the University of the South, Sewanee, and was a law graduate of the University of Virginia.

"After his graduation in law he returned to Greenville and joined his father and the late Colonel W. G. Yerger, in the practice of law under the firm name of Percy, Yerger & Percy. At that time the Greenville bar was composed of men of great learning and profound lawyers and it is a deserved but high compliment to say that LeRoy Percy immediately took front rank at the bar.

"He held only one public office, that of Senator from Mississippi in the Congress of the United States. While in service in the Senate he demonstrated his ability as a statesman on many occasions.

* Mrs. Lucy Somerville Howorth, Secretary, Committee on Obituaries and Memorials of the Mississippi State Bar Association.

"Returning to Greenville after the expiration of his term in the Senate he resumed the practice of law with his son, W. A. Percy, and D. S. Strauss, under the firm name of Percy & Percy, and continued in the practice until his death.

"As the outstanding citizen of the Mississippi Delta, LeRoy Percy was always wide awake to the needs of his people and always served them devotedly and unselfishly. He answered every call without thought of self and his wise judgment usually solved every problem for the best.

"During the recent Great War, being over the age to bear arms in defense of his country, he joined the Y. M. C. A. in France and worked untiringly in that great service.

"He did more than any man to solve the Delta's greatest problem, flood control, and it is due to his memory to say that in a large measure it is through the efforts of this great citizen that peace, happiness and contentment will soon come to our people and they will no longer have to face the menace of the flood waters of the Mississippi.

"In probably the last public address of this great citizen, made in Greenville, he said: 'The time may not be far distant when I shall rest in the bosom of the soil of Washington County, among loved ones and friends and if it can be said of me that I fought a good fight, I am more than satisfied.'

"On Christmas Day in the bosom of the soil of Washington County, and among loved ones and friends, he was laid to rest, and truly can we say of this great citizen, lawyer and statesman, that he 'fought a good fight' always. This great leader gone from our midst will be remembered so long as any of us live."

ALBERT TATUM DENT was born in Noxubee County, Mississippi, and died in Macon in December, 1929, his widow and eight children survive him. Mr. Dent served as Mayor of Macon for many terms, and served in the State Senate in 1894, 1906, 1924 and 1928. He was a loyal Mason and a devout member of the Presbyterian Church. He had practiced law for more than forty years and was a student and scholar as well as an able and resourceful practitioner. His knowledge of Constitutional law was notable.

MAJOR PAT HENRY died May 18, 1930 in Brandon. He was born in Cynthia, Madison County, Mississippi, February 12, 1843, and moved to Brandon when 18 years of age and lived there all the balance of his life. He was educated at Mississippi College and Nashville Military College. He was one of the first to enlist in the Confederate Army and was promoted to the position of Major of the 14th

Mississippi Regiment before the end of the war. He was admitted to the bar in 1873. Major Henry served two terms in the State House of Representatives, one term in the State Senate, and was a member of the Constitutional Convention of 1890. He served two years as U. S. District Attorney for the Southern District of Mississippi, having been appointed by President Cleveland and served with distinction two terms in Congress as Representative. "No grander soul was ever clad in human frailty and his passing marked an epoch not only in the annals of Rankin County, which he loved so well, but in his beloved State of Mississippi."

J. W. CASSEDY was born July 22, 1876 in Summit, Mississippi; he died in September, 1929. His widow and three children survive him. Mr. Cassedy was a graduate of the Law School of the University of Mississippi and maintained a law office in Brookhaven at the time of his death. His practice extended throughout the State. He was a great lawyer, and one of the most formidable adversaries at the bar. Mr. Cassedy was extraordinarily able in the cross examination of witnesses, and was retained in many cases to assist in the trial. "In his death the State has lost a faithful, patriotic man and the bar, one of its best and most loved members."

SAMUEL HARDY TERRAL was born in Quitman on July 15, 1872 and died September 5, 1930. He was educated in the public schools and Southern University at Greensboro, Alabama. He was admitted to the bar in 1894. He was an able and successful lawyer, being president of the Bank of Quitman at the time of his death. His wife and daughter survive him. Mr. Terral was a Mason, a Shriner, and a member of the Knights of Pythias and of the Methodist Church. He served as Mayor and Alderman of Quitman.

JAMES A. TEAT, of Jackson, was born in Spring Dale, Attala County, Mississippi, and died in Jackson March 25, 1930. He practiced law after graduation from Millsaps College, in Kosciusko, from 1900 to 1911, when he was appointed Circuit Judge. After serving as judge, Judge Teat moved to Jackson where he built up a large practice. Two daughters survive him. Judge Teat was recognized as a lawyer of outstanding ability, as an honest and upright Judge and as a man with a wide acquaintance and many friends.

MOSES D. LANDAU, a distinguished member of the Vicksburg bar, was born in Greenville and died in Vicks-

burg in 1930, leaving surviving him his wife and daughter. Mr. Landau never held public office, but always took a deep interest in civic and political affairs. "As a lawyer he was diligent, able, learned and wise," and as a "member of the Mississippi bar he was one of its brightest ornaments."

ELLIS W. PATRICK was born April 29, 1895 in Rankin County and died in Jackson October 27, 1929. Mr. Patrick served in the Field Artillery during the World War, and is survived by his wife and six children. He graduated in both the literary and law departments of the University of Mississippi and practiced in Jackson until his death. He had established a good practice and was a capable and courteous lawyer.

After the conclusion of the reading of the resolutions, short and appropriate talks were made by the following members of the bar:

George Butler, D. W. Heidelberg, T. J. Wills, C. O. Jaap, Jr., R. L. Dent, W. T. Bennett, and G. Q. Whitfield.

The service was closed on behalf of the Court by a short and impressive address by Judge J. G. McGowen of the Supreme Court.



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NOTE: The names and addresses of all other officers, committeemen, and members of the Mississippi State Bar Association are contained in the August, 1930, issue of the JOURNAL.

NOTE AND COMMENT

TOTAL AND PERMANENT DISABILITY UNDER INSURANCE CONTRACTS.—In a late case (*Metropolitan Life Ins. Co. vs. Lambert*, 128 So. 750), the Supreme Court of Mississippi held that one was totally and permanently disabled within the meaning of his contract of insurance even though after the injury and before suit was brought he was following the occupation of a nightwatchman and continued so to do some four months after the filing of the suit and before trial thereof. The part of the contract in question read as follows:

“Upon receipt *** of due proof *** that any employee insured hereunder *** *has become totally and permanently disabled, as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, the Company will *** pay equal monthly installments ***.*”

In arriving at its conclusion the Court said in part as follows:

“That the appellee has engaged since his injury, in working as a night watchman does not necessarily indicate that he is not totally disabled within the meaning of the policy. If his physical condition be, and at the time of the trial was such that, in order to effect a cure, common care and prudence required that he cease attempting to work — and his physician so testified — he was totally disabled within the meaning of the policy.”

The holding of the Court in this case is directly in line with the holding of the Court in *Serio vs. Equitable Life Assur. Soc.*, 124 So. 485, in which a similar contract was construed in favor of the insured. As regards the contract itself these cases are on all fours. In deciding the *Serio* case the Court cites with approval the case of *Metro Cas. Inc. Co. vs. Cato*, 74 So. 114. The contract in that case, however, was essentially different in that it provided for compensation “where the injuries *** continuously and wholly disable and prevent the insured from performing any and every kind of duty *pertaining to his occupation.*” It is quite easy to see that this contract is different from the one in question in the *Serio* and *Lambert* cases, in that that contract provided payment only where the insured was prevented by disability from carrying on not only his own occupation, but also any other gainful occupation, and performing any work for compensation or profit.

It seems to the writer that in failing to give effect to the distinction between the two contracts in the cases cited, the Court has gone beyond the proper limit of construction.

That the clear weight of authority is with the holding of the Court in *Metropolitan Casualty Ins. Co. vs. Cato* cannot be doubted. *Bro. of Locomotive Firemen & Enginemen vs. Aday*, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S. 126; *Davis vs. Midland Cas. Co.*, 190 Ill. App. 338; *Kelly vs. Supreme Court, I. O. F.*, 195 Ill. App. 501; *National Life & Accident Co. vs. O'Brien Ex.*, 159 S. W. 1134, 155 Ky. 498; *Young vs. Travelers Ins. Co.*, 80 Me. 244, 13 A. 896; *James vs. U. S. Cas. Co.*, 113 Mo. App. 622, 88 S. W. 125; *Gross*

vs. Commercial Cas. Ins. Co., 101 A. 169; *Continental Cas. Co. vs. Wynne*, 36 Okla. 325.

It is submitted, however, that there is a clear cut distinction between this case (*Metropolitan Cas. Co. vs. Cato*) and the line of authorities in accord with it, and the Lambert case. They are based upon entirely different contracts.

The contract in the Lambert case specifically and purposely limited the liability of the company to a very narrow field, and as a consequence of the small protection afforded, only a small premium was charged and paid.

Mr. Cooley in his work on Insurance says: "The provision may limit total disability to the inability to carry on any and all kinds of business. Under such a clause the insured must be unable to perform not only the duties of his usual occupation, but the duties of any other occupation." *Cooley's Briefs on Insurance*, Vol. VI, p. 5548. *Supreme Tent of Knights of Maccabees of the World vs. Cox*, 60 S. W. 971; 25 Tex. Civ. App. 366; *Lyon vs. Railway Passenger Assur. Co.*, 46 Iowa 631; *Supreme Tent of Knights of Maccabees of the World vs. King*, 79 Ill. App. 145.

The Supreme Court of Iowa has held that a farmer, by the loss of a leg is not prevented "permanently, continuously and wholly from performing any work or following any occupation for compensation or profit" within a disability insurance policy. *Hurley vs. Bankers' Life Co.*, 198 Iowa 1129, 199 N. W. 343, 37 A. L. R. 146.

So where the contract provided that the insured must be unable to follow "his usual or other occupation" one who, though unable to follow his own trade or profession, could perform the duties of another occupation, could not recover. (*Albert vs. Order of Chosen Friends*, 34 Fed. 721.) But the duties he can perform must belong to some recognized trade or occupation, and it is not sufficient that he can perform occasionally light duties not connected with any occupation. *Starling vs. Supreme Council Royal Templars of Temperance*, 66 N. W. 340, 108 Mich. 440, 62 Am. St. Rep. 738.

The practical business of insurance requires every company to issue many different kinds of policies, covering a variety of hazards and subject to many conditions. As the hazards increase or diminish, the liability increases or diminishes, and this requires that the sum charged as a premium be regulated by and be adjusted to the liability assumed.

Where the premium charge is small, the number of hazards must be correspondingly small, and this can be done only by limiting the number of hazards covered and excluding such hazards as the policy is not intended to cover.

It is undisputed in the evidence in the Lambert case that the insured was not prevented by disability from engaging, for some six months, (during which months the Court permitted a recovery under the policy of disability benefits), in an occupation (to-wit, that of night watchman) and was not prevented during said months from performing work for compensation.

It is respectfully submitted, therefore, that in the Lambert case the Court by its construction has written a broader contract than that intended by the parties thereto. May it not even be said that the Court has written a new contract not that written by the parties themselves.

The above review is submitted with the greatest deference to the great Court which handed down the decision, and the full consciousness of the limited learning and experience of the author hereof.

W. CALVIN WELLS, JR.

ADOPTION — RELATION IT CREATES — EFFECT ON PROPERTY RIGHTS IN MISSISSIPPI.

ADOPTION

Adoption is an act by which the relation of parent and child is created in law between persons not so related by nature. (*Simmons vs. Burnell*, 28 N. Y. S. 625.) It was unknown to the common law and in states whose law is based solely on that system adoption can exist only by virtue of statute. (*Abney vs. De Loach*, 84 Ala. 393, Woodward's Appeal 81 Conn. 152; *Ross vs. Ross*, 129 Mass. 243.)

In *Matter of Feigler*, 143 N. Y. S. 562 the court said:

"From Bracton to Blackstone there is no recognition by the common law of such an artificial augmentation of the family relation or of a succession by adopted children. In Anglo-Saxon law it was otherwise; but the practice of the Saxons disappeared speedily in England, and Kents Commentaries on American Law disclose that the common law, received and in force, took no notice of adoption as a legal act."

Adoption in Mississippi is governed by Section 358, Code of 1930, which is the one and only statute appearing in our laws that has any material bearing on the subject of adoption.

Among other things this statute says: "And (petitioner) shall also state in the petition what gifts, grants, bequests he proposes to make or confer, if any, upon such person sought to be adopted."

Further it says, "and that such person so adopted shall be entitled to all the benefits proposed by the petitioner to be granted and conferred."

RELATION IT CREATES

Thus it would seem that the status of the adopted child would depend almost wholly on the petition for adoption as filed by the adopting parent. In *Beaver vs. Crump*, 76 Miss. 34, 23 So. 432, construing an almost identical statute, the court said: "The adoption in this case carries with it only the specific gifts, grants, bequests, and benefits provided in the petition." The court further held in this case that heirship was not an incident to adoption but that such right must be specifically set out in the petition of the adopting parent.

But in *Adams et al. vs. Adams et al.*, 102 Miss. 259, 59 So. 84, the court held that a decree for adoption, which awarded the custody of the infant to the adopting father, who was clothed with the same rights and bound by the same obligations with reference to the infant as those of a parent, and under which the infant is clothed with the rights and bound by the obligations of a daughter, with reference to the adopting father and his estate, at his death, creates the relationship of heir on the part of the adopted daughter.

As a general rule adoption places the child adopted more or less completely in the position as the rights, duties etc., of a natural legitimate child.

He is to all intents and purposes the child of his adopting parents, at least so far as the relations between himself and them are concerned. His natural parents, if living, have no longer any control over him and owe him no duty as parents, nor does he owe them any duty as their child. (Long — Domestic Relations, 3rd Ed., Sec. 254.)

The courts of Kentucky seem to have stated as clear a principle as can be found governing the effect of adoption. It is, "That it is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child by the event of adoption, becomes the legal child of the adopting parents, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declares otherwise. And when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all the legal rights and capacities, including that of inheritance, of a natural child and is under the same duties." (*Power vs. Hafley*, 85 Ky. 671, 674, 4 S. W. 683.)

In Mississippi: "The statute is wholly unlike those of most of the States of the Union, and is similar in some respects to those of only two States, so far as we have been able to ascertain." (*Beaver vs. Crump*, *supra*.)

It would seem then that we are out of step with the rest of the states and that the decisions of their courts are of little or no importance to us, in so far as they might be used to help construe or interpret our statute.

EFFECT ON PROPERTY RIGHTS IN MISSISSIPPI

Thus, to establish principles governing property rights effected by adoption in Mississippi, the decisions of the Mississippi courts alone must be followed. There can be found only a few cases, not more than seven or eight, on this subject that have been decided and the most of them are of no great value in determining the rules as to descent of property.

OF THE CHILD

It seems well settled though in this State that the property rights of the adopted child are limited strictly to those conferred by the petition of the adopting parents, and the subsequent decree of the court on such petition. (Section 358, Code of 1930, *Beaver vs. Crump*, *supra*; *Adams et al. vs. Adams et al.*, *supra*; *Leonard vs. H. Weston Lbr. Co.*, 107 Miss. 345, 65 So. 459; *McLean et al. vs. McAllum et al.*, 131 Miss. 234, 95 So. 309; *Fisher vs. Browning et al.*, 107 Miss. 729, 66 So. 132; *Brewer vs. Browning*, 115 Miss. 358.)

According to the holding of *Brewer vs. Browning*, *supra*, a foster child inherits from its foster parents, when the capacity of inheritance is conferred by the adoption.

Under the doctrine laid down in the *Brewer* case the property inherited by the child went at its death, intestate, to its parents to the exclusion of the blood relatives of the child. As a logical conclusion to be drawn from this it would seem that as the fiction of adoption excludes the blood relatives from sharing in the property of the adopted child then the fiction in turn would exclude the adopted child from its right to share in the property of its blood relatives. Cases can be found that support this theory, but they are in a very

small minority. (*Baker v. Clowser*, 138 N. W. 832; *Calhoun vs. Bryant*, 28 S. D. 266, 133 N. W. 266, support it in part.)

Such an idea might not have occurred to the learned court at the time the opinion in the *Brewer* case was handed down, but to the mind of the writer if the *Brewer* case is taken as a base, or a beginning, then the only result to be logically reached is that the fiction cannot be accepted in part and discarded in part, and that the blood relatives of the adopted child cannot be considered as the legal relatives of such child in the eyes of the law and that the child would thus have no legal right to share in the proceeds of the property of such blood relatives. This theory has not met with any judicial following to speak of but perhaps this is because no other jurisdiction has had such a case as *Brewer vs. Browning* as a beginning.

The great weight of authority is almost wholly addicted to the contrary view and thus the holding in other courts seems to be, "In the absence of statute to the contrary an adopted child may inherit both from its adoptive parents,¹ and from or through its natural parent.²

OF THE ADOPTIVE PARENTS

In arriving at the rights of the adoptive parents in the property of the adopted child who has died intestate we find that there has been only one case of any importance whatever decided along these lines in Mississippi. Our court held in the case of *Brewer vs. Browning*, *supra*, that property held by the adopted child, at the time of its death intestate, would descend as if the child was a natural child, and would therefore go to the surviving parent, who is in the eyes of the law the parent of the adopted child.

It is true that the case of *Fisher vs. Browning*, 107 Miss. 729, 66 So. 132, the rule was laid down that the blood kin of the adopted child would inherit the property of the adopted child to the exclusion of the adopted parents, but this case was expressly overruled by the case above discussed, *Brewer vs. Browning*, *supra*.

As a general rule, it might be interesting to note, the courts hold that the lineal descendants of the adopted child succeed to his property, even though it was inherited from his adoptive parents. (*Paul vs. Davis*, 100 Ind. 423.)

It seems that here again Mississippi might be out of step, but our rule now standing appeals to the mind of the writer as being more just and praiseworthy than the contrary rule. In the case of *Fisher vs. Browning*, *supra*, Judge Miller expressed his distaste for the rule then in force in a strong dissenting opinion. His words were:

"It is indeed a strange and illogical conclusion, it seems to me, to which the majority of the court have arrived in this case; this child had its status fixed by the laws of Kentucky, under which laws, as above stated, if it had died there, the property it inherited from Mrs. Rule would have gone to Mrs. Rule, rather than to its blood kin, and yet by way of *res adjudicata*, and otherwise, the court has given it by inheritance an interest in the lands of Church Rule and yet refuses to enforce the legal result flowing from the status created thus in Kentucky, to-wit,

¹ *Patterson vs. Browning*, 146 Ind. 160, 44 N. E. 993; *Humphries vs. Davis*, 100 Ind. 272; *Clarkson vs. Hutton*, 143 Mo. 47, 44 S. W. 76.

² *Wagner vs. Wagner*, 50 Iowa 532.

that upon its death without issue intestate its property does descend to its adoptive mother, Mrs. Lula A. Rule.

"The logic of the majority of the court is incomprehensible to me. If we are bound to enforce its status as an adopted child in Kentucky, then it seems clear to me that we ought to enforce all the legal rights of that status that would flow in the State of Kentucky on its death.

"It is so monstrously unjust to conceive of a man laboring and accumulating a fortune and dying and leaving it to his wife and an adopted child, and that upon its death before the death of its adoptive mother, the adopted child's relatives who have never been adopted by the adopting father and mother, and who are strangers to the blood, should take the property of the child thus inherited in the adoptive family, rather than its adoptive mother as to shock my sense of justice and fair play, and I refuse to yield my assent to any such construction of the statute of adoption."

OF BLOOD RELATIVES OF CHILD

There seems, however, in force now in Mississippi no case which clearly establishes the rights of the blood relatives of the adopted child as pertaining to property of the adopted child in its possession at the time of its death, intestate.

In *Fisher vs. Browning*, *supra*, the rule was laid down that the property of the adopted child would, at its death go to its next of blood kin. This rule was abrogated by the case of *Brewer vs. Browning*, *supra*, decided three years after *Fisher vs. Browning*.

It is held in other jurisdictions that the property of the adopted child descends to its blood kin, even though such property might have been inherited from the adoptive parents. (*Paul vs. Davis*, 100 Ind. 423.)

In the light of what has been said before, it would seem that the fiction of adoption as advanced in the *Brewer* case would result in the blood kin of the adopted child being seen in the eyes of the law as strangers, and therefore entitled to no right of inheritance in its property.

CLAUDE F. CLAYTON.

EXEMPTION OF LAWYERS FROM SERVICE OF CIVIL PROCESS WHILE ATTENDING COURT IN A FOREIGN JURISDICTION.—In a recent case in the District Court of the United States of the Delta Division of the Northern District of Mississippi, a lawyer from Chicago, Illinois, coming to Mississippi for the purpose of representing his client in the District Court of the United States and devoting himself exclusively to his duties as attorney in her defense, was served with process in an ancillary proceeding while preparing to take a train for his home in Chicago on the same day that final decree was entered in the principal case. Upon motion the process was quashed. *Schmitt vs. Lamb*, 43 Fed. (2nd) 770.

The exemption of attorneys from service of process while in attendance upon courts in jurisdiction other than the jurisdictions in which they reside if recognized at all must be recognized on the same theory that witnesses and non-resident parties are exempt from the service of process; that is for the purpose of the administration of justice and is therefore based on public policy. "It is a privilege of the court as affecting its dignity and authority.

Hale vs. Wharton, 73 Fed. 739. The object seems to be to protect all persons necessarily before the court and having business before it. If it were not extended to attorneys this principle would be violated. There is no defect of jurisdiction in the State; the exemption is based on consideration of policy as to the exercise of jurisdiction." Goodrich Conflicts of Laws, p. 136.

The common law rule as to the question of service of process in Civil Actions is stated by Tidd on Practice, p. 196, as follows: "The parties, and their attorneys and witnesses, are for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the courts." The rule is stated in 2 Taylor Evidence as follows: "In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of judicial proceedings, but, in common, parties, barristers, solicitors, and in short, all persons who have that relation to a suit which calls for their attendance, they are protected from arrest upon any civil process while attending there for the purpose of the cause and while returning home."

In a very early case in Virginia, *Commonwealth vs. Ronald et al.*, 4 Call 98, the rule is laid down that the privilege is part of the common law of England and extended not only to judges, but to attorneys, witnesses and the parties themselves. While the Georgia Supreme Court recognized the privilege of Common Law it states that there is a difference in the relation which the profession sustains both to the court and the public and that an attorney was not privileged from arrest under ca. sa. It, however, recognized the privilege of the attorney to be discharged if arrested while in attendance on the court and actually engaged in transacting the business of his client. *Elam vs. Lewis*, 19 Ga. 608.

The New York Courts recognized the privilege of the attorney from service of process in the case of *Gilbert vs. Vanderpool & Beekman*, 15 John. 242, but this rule was later changed by the passage of statute and the privilege was not afforded to an attorney in the later case of *National Press Intelligence Co. vs. Brooke*, 41 N. Y. S. 658. The court held that the service of a summons would not interfere with the discharge of the attorney's duties. This case seemed to overrule the former New York cases.

In the case of *Parker vs. Marco*, 136 N. Y. 585, 20 L. R. A. 45, a defendant residing and sued in a Federal Court in South Carolina went to New York to attend the examination of plaintiff witness before a Notary Public. He was served with process before he was able to leave the State. He made a motion to set aside the service of process, claiming that he was privileged and the motion was sustained. It appears to the writer that the defendant was doing no more than his attorney would have done. Therefore the attorney should be given the same right under this case as was given to the defendant.

The South Carolina Supreme Court in the case of *Williams vs. Hatcher*, 78 S. E. 615 (S. C.) in sustaining the privilege of an attorney from Georgia from service of process while attending court in South Carolina adopted the reasoning of Gary, Judge, in *Brown vs. Miller Lumber Company*, 65 S. E. 214, which exempted a non-resident from service of process while in the State attending court as witness or a party and which rested the decision on the "high consideration of public policy and not on any statute law, since it is to public

interest that suitors and witnesses from other States, who cannot be compelled to attend our courts, may not be deterred from voluntarily appearing by fear of being served with process in other actions."

In the case of *Hoffman vs. Judge of the Circuit Court of Bay County*, 113 Mich. 109, 38 L. R. A. 663, 67 American State Reports 458, 71 N. W. 480, it was held that an attorney was privileged from service of process while in attendance upon the Supreme Court and while going to and returning from the Court to the County of his residence. The attorney was returning home from attending the Supreme Court and was served with process in a County through which he passed.

The above case was criticized by the Supreme Court of North Carolina in the Case of *Greenleaf vs. Peoples Bank*, 133 N. C. 292, 63 L. R. A. 499. The privilege of the attorney was not recognized and the service of process on him at his hotel, although he was in attendance upon the United States Circuit Court for the purpose of representing his client as their attorney in the matter of the confirmation of a sale of property.

However, the case of *Greenleaf vs. Peoples Bank* was not followed in the case of *Read vs. Neff et al.*, 207 Fed. 890. In this case, process was served on the attorney after the case in which he was interested had gone to the jury but before it had returned a verdict. Judge McPherson in sustaining the motion to vacate the summons and dismiss the case said, "Every litigant has the undoubted right to select from the entire bar any lawyer deemed by him best to select. There is a spirit of comity between all courts, national and state, by reason of which any court allows, on motion, an attorney from another jurisdiction to appear in the particular case. It is not within the spirit of fair dealing and such comity for this court to hold that, if a lawyer from another state comes into this court, he does so at the peril of being sued."

This case followed the Hoffman case and the case of *Central Trust Company of New York et al. vs. Milwaukee St. Ry. Company*, 74 Fed. 442. In this latter case the attorney was from New York and engaged in a case in Wisconsin and before departure was served with subpoena to attend the hearing as witness. He filed a petition to vacate the service of the subpoena and the motion was sustained. The privilege was also sustained where the attorney went into a foreign jurisdiction to take depositions. *Higgins vs. California Prune & Apricot Growers*, 282 Fed. 550.

In a federal case which was decided under the statute of Illinois an attorney from another state might be served with process as the attorneys in that state might be served with process and no greater privilege was given to foreign attorneys than given to the attorneys of the State. *Robbins vs. Lincoln*, 27 Fed. 342.

The exemption from service of process was not accorded to an attorney for a non-resident party who came into Minnesota for the purpose of taking a deposition of a witness residing therein in the trial of an action pending in the State of the attorney's residence. *Nelson vs. McNulty*, 135 Minn. 317; *Chicago, B. & Q. R. Co. vs. Davis et al.*, 111 Neb. 737, 197 N. W. 599.

In the case of *Paul vs. Stuckey*, 126 Ark. 389, 189 S. W. 676, L. R. A. 1917 page 888, the defendant was engaged in the trial of a criminal case and was called from the court room and summons issued in a civil suit was served on him. He

moved to quash the service of summons and the trial court sustained the motion, but its decision was reversed on appeal. The circumstances of this case present a strong case for arguing in favor of the attorney's privilege. The court in deciding the case, however, stated that the reasons for exempting an attorney from service of process while attending court were unsatisfactory and the case was decided in accordance with *Greenleaf vs. Peoples Bank*, *supra*.

The Court should be open and accessible to every person that wishes to come within its jurisdiction and the litigant party should be enabled to procure the attendance of counsel to manifest his rights. He will be deprived of his right to be represented by counsel of his selection in the trial of a case in a sister state if when counsel enters he does so at the peril of being served with process in other suits. It is of great importance to attorneys to prevent the institution of suit in courts a great distance from their homes and businesses and they will refuse to conduct suits in jurisdictions where it is likely that they will be served with process as soon as they enter. The administration of justice would then be obstructed if parties were not able to have necessary counsel before the court in the trial of their cases. There is no unfair advantage taken by exempting an attorney from service of process while attending a court in a foreign jurisdiction as the attorney could not be sued in the foreign state but for the business that brought him in.

The decisions on the subject are clearly conflicting in the courts of the States, while in the courts of the United States, with one exception, the privilege is recognized. In the opinion of the writer, the weight of authority and the better reasoning is in favor of the exemption of lawyers from service of process while attending court.

L. O. SMITH, JR.

MORTGAGES—HOW LANDS SOLD UNDER MORTGAGES AND DEEDS OF TRUST—All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust hereafter executed, shall be sold in the manner provided by section one hundred and eleven of the Constitution for the sale of lands in pursuance of a decree of court, or under execution. All lands sold at public outcry under deeds of trusts hereafter executed, or other contract hereafter made, shall be sold in the county in which the land is located, or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. Sale of said lands shall be advertised for *three consecutive* weeks preceding such sale, in a newspaper published in the county, or if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated for said time, and such notice and advertisements shall disclose the name of the mortgagor or mortgagors whose property is advertised for sale. No sale of lands under a deed of trust or mortgage shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by the statute of limitations, except as to the ten year-statute of adverse possession. (Code 1930 Section 2167; H-2276; 1908 ch. 2772; 2772; 1896 ch. 103; 2443.

Section one hundred and eleven of the Constitution of the State of Mississippi provides: All lands comprising a single tract sold in pursuance of decree of court, shall be first offered in subdivisions not exceeding one hundred and sixty acres, or one quarter section, and then offered as an entirety, and the price bid for the latter shall control only when it shall exceed the aggregate of the bids for the same in subdivisions as aforesaid; but the Chancery Court, in cases before it, may decree otherwise if deemed advisable to do so.

In spite of these statutes there are cases frequently coming before our Supreme Court upon which the Court is forced to call a sale void because some lawyer has failed to heed the statutes. The most recent case arising in our Court under these statutes is the case of *Smith vs. Deas* (130 So. 105). In this case the last publication of trustee's sale under deed was on November 12, and sale was not had until the following December 6th, and therefore more than a week elapsed between date of sale. The Court following up its former decisions rendered the trustee's deed under such circumstances absolutely null and void. One of the former cases which the Court followed was the case of *Lake vs. Castleman*, 76 So. 877, in which case a notice for foreclosure sale published October 8, 15, 22, and 29, followed by sale on November 2, and a publication of July 7, 14, 21 and 28, with a sale on July 31, were sufficient; less than a week having elapsed between the day of the last notice and the day of the sale. It seems that if the necessary twenty-one days has elapsed between the date of the first publication and the date of the last that the land may be sold on any day during the week elapsing between the date of last publication and the day of the sale. It is not essential that the notice appear on the same day of the week for three consecutive weeks, for it may appear on Monday, December 1st, Tuesday, December 9, and Wednesday, December 17th, in which case the sale could be made on either December 23rd or 24th. But the safer plans seems to be, to advertise for four consecutive weeks, thereby insuring the intervention of the statutory requirement, and also giving the trustee the right to sell on more than one specific day. Another case illustrating this point is the case of *Planter's Mercantile Company vs. Braxton et al.* (82 So. 323), in which case the last publication was on March 25th and the sale was made on April 3rd, a lapse of nine days, which caused the Court to again reach the decision that the proceedings were condemned. A further suggestion was advanced in the case of *Donald et al. vs. Commercial Bank of Magee et al.* (97 So. 12), in which it is stated that in computing this time that the first day of the publication is excluded and the day of the sale included. The parties have the right to contract for a longer period of advertisement, and where a trust deed provided for the thirty days' advertised notice of sale a sale made after only twenty-two days' publication of the notice of sale was a non-compliance with its terms, which invalidated the sale. *Wilczinski vs. Watson* (69 So. 1009).

Another failure to act as provided by the statute was in the case of *Fauntleroy vs. Mardis et al.* (85 So. 96), in which case no notice was posted as required, at the courthouse door, and here again the Court rendered a conveyance void for failure to act according to the statute.

The careful conveyancer usually inserts in a trustee's deed the grant of power authorizing him to act and recital of the performance of the formalities usually incident to foreclosure of trust deeds. *McCaughn vs. Young* (37 So.

839). But in the case of *Jones et al. vs. Frank et al.* (85 So. 310), where a deed of trust was foreclosed and the trustee's deed recited with particularity the authority vested in the trustee, the default in the payment of the indebtedness, the instruction to sell, and that the sale was made after a newspaper advertisement for the required time, but failed to recite that a notice was posted at the courthouse door as required by the above mentioned code sections, the presumption that all essential conditions were complied with in making the sale, especially as to the required advertisement, is rebutted by these recitals of the deed of trust, and the burden of proof is on the plaintiff to show that a notice of the sale for the required time was posted at the courthouse door.

Sales of land made under deeds of trust by substituted trustees shall not convey the interest of the grantor or grantors therein, but shall be absolutely null and void both at law and equity, unless the substitution shall appear of record in the office of the Chancery Clerk of the county where the land is situated, and unless it shall so appear by being actually spread at large upon the record before the first advertisement or notice of sale shall have been posted or published; the filing for record or lodging with the clerk not being sufficient. Such substitutions, however, may so appear by a separate instrument recorded as above set out in all respects, or a copy of such substitution may be recorded as above set out. (Code 1930-2168; 2277; 2773; 1896 ch. 96). A substantial compliance with this section is met where the appointment of a substituted trustee is recorded in a deed book instead of in the record of mortgages and deeds of trusts as anyone exercising reasonable diligence in investigating a land title would not only investigate the indexes and records of mortgages and deeds of trusts but would also investigate the indexes and records of deeds. *Camp et al. vs. Celtic Land and Company* (91 So. 897). A strict construction is applied to this section. This principle was laid down in *Guion vs. Pickett*, (42 Miss. 77) in which case the trust deed recited that the power of substitution should be exercised in the event the trustee named in the deed of trust "neglect or refuse." The court held that the trustee named who had died had neither neglected nor refused, that a dead man was unable either to neglect or refuse, and that, therefore, death was not provided for. However, in the case of *Jones vs. Salmon et al.* (91 So. 199) where the words "fail or refuse" were used, the court held that one who is dead has certainly failed as far as doing the things of this life are concerned and the cestque trust is not required to do the vain thing of requesting him to act as a condition precedent to the appointment of another trustee.

CARROLL KEMP.

RECENT IMPORTANT DECISIONS

ARREST—ON SUSPICION AND PROBABLE CAUSE—USE OF EVIDENCE OBTAINED UNDER ILLEGAL ARREST.—The constable received a report that two or three young men were creating a disturbance near the residence of the informant, and without a warrant he went at once to search for them. An unoccupied car was pointed out to the officer as being the car in which the young men had been riding, and upon inspecting the car, the constable found that it did not have a license tag as required by law. Presently the three young men came out of a cafe and walked over to the car, when the constable inquired whose car it was; whereupon the appellant said that it was his car and stated that he was driving it. The officer immediately arrested appellant, and, on searching him, found a bottle of whisky in his overcoat pocket, and on the evidence thus secured, an affidavit charging him with the possession of intoxicating liquor was made, and he was convicted on the latter charge, notwithstanding the fact that seasonable objection was made to the introduction of the whiskey as evidence which had been thus obtained, under an illegal arrest. HELD: That an automobile standing unoccupied in street, without a license tag, did not show a crime was being committed, and the arrest, without a warrant, of the person claiming the automobile was illegal; and therefore the evidence thus obtained was improperly admitted in a liquor prosecution. *Myers vs. State*, 130 So. 741.

The first question raised in this case is that of arrest on suspicion or probable cause. While it is well established that arrests may be made on probable cause, the difficulty in applying the rule seems to be in determining just what constitutes "Probable Cause." This can usually be determined only by the peculiar facts and circumstances that surround each case. However, our Court, in deciding this case, lays down a broad general rule, which will serve as a guide, and defines as nearly as possible in general language what constitutes "Probable Cause" as a grounds for arrest. The rule is as follows: "One of the safest tests, although we do not declare is to be under all circumstances an exclusive test, of when a misdemeanor is committed in the presence of an officer, is whether the officer as a witness could at the time of the arrest of his own knowledge testify to sufficient facts as having happened in his presence to make out a case for conviction, if his evidence were undisputed; and, of course, an admission made to him or in his hearing is sufficient to supply knowledge of those facts competent to be covered by an admission." The rule is illustrated by the cases of *Ex Parte Rhodes*, 79 So. 462; *Hill vs. Wyrosdick*, 113 So. 49, 219 Ala. 235, and *King vs. State*, 113 So. 173, 147 Miss. 31. The second part of the rule, that is, "and, of course, an admission made to him or in his hearing (speaking of the officer), is sufficient to supply knowledge of those facts competent to be covered by an admission," is well illustrated by the case of *Williamson vs. State*, 105 So. 479, and *Heard vs. State*, 59 Miss. 545 and other illustrative cases, and should

be distinguished from the cases where no confession is involved. As the decision in the case of *Myers vs. State* points out, the confession alone is not, of course, enough to supply the corpus delicti, but there must also presently exist, independent of the confession, the essential facts which constitute the corpus delicti. *Heard vs. State*, 59 Miss. 545.

The next question raised is in reference to the introduction of evidence obtained under illegal arrest. Again we see that the knowledge of the general rule that evidence thus obtained is inadmissible is not the basis of the difficulty, but the application of the rule. I can find no general rule which attempts to lay down in just what cases evidence obtained under an illegal arrest can be introduced; hence, we must turn to individual cases, which will not only illustrate the rule but the application of same. It is interesting, however, to note the difference of the application of the rule by the various States, as for instance, it seems that evidence obtained under illegal arrest, searches and seizures, in Alabama which would be admissible there according to some of their decisions, would not be in Mississippi. Alabama cases holding such evidence admissible: *Griggs vs. State*, 93 So. 499, 18 Ala. App. 467; *Owens vs. State*, 109 So. 109, 215 Ala. 42; *Ex Parte Bell*, 76 So. 1, 200 Ala. 364; Mississippi cases holding evidence inadmissible: *Tucker vs. State*, 90 So. 845, 128 Miss. 237; *Hill vs. State*, 92 So., 129 Miss. 445; *Butler vs. State*, 101 So. 193, 135 Miss. 885 and others.

CARY STOVALL.

SALES — LIABILITY FOR PRESENCE OF MICE IN DRINKS.—Appellee brought this action against appellant to recover of the latter damages for a personal injury suffered by the former as the result of drinking a poisoned Coca-Cola, put on the market by the appellant. The evidence on behalf of appellee tended to show that the bottle contained a decomposed mouse, which appellee swallowed in drinking the Coca-Cola before he discovered its presence, resulting in ptomaine poison. The basis of appellee's action was that appellant, in bottling and putting Coca-Cola on the market for human consumption impliedly warranted that it was fit for that purpose; and the bottle in question being unfit for human consumption, appellant thereby breached such implied warranty.

HELD: That the manufacturer of a drink put on the market for human consumption impliedly warranted that the drink was fit for that purpose; and if the drink was not fit for that purpose there was a breach of the implied warranty, for which manufacturer is liable to person consuming the drink for the injury resulting therefrom. *Coca-Cola Bottling Works vs. Simpson*, 130 So. 479.

There are two lines of decisions on these cases of which I shall specially treat: first, where the cause of action has as its foundation the implied warranty of contract that the drink or food is wholesome and fit for human consumption; and second, where it is based on the negligence theory as a ground for liability. The note on this case will not treat the cases in regard to sale of impure food for live stock consumption.

It is the opinion of the Mississippi courts that a person sustaining an injury from the drinking of a poisoned drink containing a foreign substance has a good cause of action based on the implied warranty of contract. 106

Miss. 864, 64 So. 791; 131 Miss. 315, 95 So. 444; 140 Miss. 502, 106 So. 97; 44 A. L. R. 124; 145 Miss. 876, 111 So. 315. The leading case on this point is that of *Watson vs. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. State Rep. 157. I want to call particular attention to the case of *Grapico Bottling Co. vs. Ennis*, 140 Miss. 502, 106 So. 97. The appellee in this case bought the drink on Sunday from which he alleges the injury—the court holding under Section 1366 Code 1906 (Hmg. Code, Section 1102—Code 1930, Section 1131) that a person who buys a drink on Sunday, being *pari delicto* of the seller, is not entitled to recover against the manufacturer on the theory of implied warranty of the unwholesomeness of the drink. See, also, 110 Am. S. Rep. 157.

The general rule of common law is undoubtedly that upon the sale of goods, if there be no express warranty of the quality of the goods sold and no fraud, the *maxim caveat emptor* applies and no warranty is implied by law. 110 Mass. 320, 14 Am. Rep. 608. But it is contended in that case that when articles of food are sold for immediate consumption the general rule does not apply, and there is an implied warranty. In 35 Cyc. 406 the statement is as follows: It is, however, the general rule that where the sale is for immediate consumption there is implied warranty that the food is wholesome and fit for human consumption, irrespective of the knowledge of the seller of the defects therein. See 247 Fed. Rep. 921. Other cases holding the implied warranty theory are: 251 Pa. 52, 95 Atl. 931; 93 Kan. 334, 144 Pac. 202; 75 Wash. 622, 135 Pac. 633; 189 Iowa 775, 176 N. W. 382.

Upholding the negligence theory on this point we find a very good line of authorities, leading cases are: 6 N. Y. (2 Seelen) 397, 57 Am. Dec. 456; 219 Ill. 421, 76 N. E. 573; 75 N. J. L. 748, 70 Atl. 314; 132 Tenn. 23, 177 S. W. 80; 142 N. E. 756; 93 Kan. 334, 179 S. W. 155; and 205 Ala. 678, 89 So. 64. The liability in these cases is based on an omission of duty to give a pure food or drink for immediate human consumption.

Different courts are very well settled on the two different principles: there being good authority on either theory, but in the later decisions there seems to be a leaning of the courts toward the implied warranty theory.

WILLIS McILWAIN.

EVIDENCE — RELATIVE WEIGHT OF POSITIVE AND NEGATIVE TESTIMONY AS TO THE OCCURRENCE OF A FACT.—The appellees charged in their declaration that deceased was killed by the negligent operation of a train of the appellant railroad company, at a street crossing in the city of Jackson. The accident occurred at night. Deceased was riding as the guest of one Clark, the driver, in an automobile which was struck by the appellant's train. By the theory of the appellees, the train was backed over the crossing, the headlight of the engine shining in the opposite direction, no warning signal was given, and no watchman was stationed at the crossing, in violation of an ordinance of the city. The appellant attempted to establish that the engine was drawing the train, the headlight shining on the crossing, and that the death was caused by the negligence of Clark, the driver, and of deceased, by driving an automobile into the side of a moving train. It was admitted that the automobile did not stop, which was a violation of the "stop, look, and listen" statute. The

witness Clark testified that he did not hear the whistle blow, but that he was not paying particular attention. Three employees of the railroad company testified positively that the whistle was blown. HELD: Testimony that fact did not occur by witness so situated that in ordinary course of events he would have heard or seen fact, warrants finding fact did not occur. Affirmed. *Y. & M. V. R. Co. vs. Beasley et al.*, Supreme Court of Mississippi, 1930. 130 So. 499.

The instruction, requested by appellant, that it had been established by the evidence that the whistle was blown, which would have eliminated that ground of negligence, was correctly refused. The rule adopted by the Supreme Court of Mississippi, in the case of *C. & G. R. R. Co. vs. Lee*, 149 Miss. 543, is to the effect that, where there is positive testimony that a fact did occur, and negative testimony by another witness that he did not hear or see the fact, the question is for the jury, and the negative testimony is sufficient to sustain a verdict.

The broad general rule no doubt is that positive testimony that a fact did occur is entitled to greater weight than negative testimony, by a witness in a position to hear or see, that he did not hear or see the fact. 1 Jones on Evidence 33; 23 C. J. 43; 71 S. E. 500; 206 S. W. 442; *Lucas vs. Goff*, 33 Miss. 629. In the Mississippi case, it was held that negative testimony, by a person present and in a position to hear, that he did not hear certain words alleged to have been spoken, is not entitled to the same weight as positive testimony by other witnesses that the words were spoken.

But it is also the general rule that, in the case of signals and warnings, the question is purely for the jury, and negative testimony is sufficient to sustain a verdict. 1 Jones on Evidence 35; 23 C. J. 45; 100 S. W. 764; 134 Pac. 709; 44 N. W. 686; 34 N. E. 1070; 29 S. E. 953; 137 Miss. 572; 137 Miss. 613; 138 Miss. 360; 142 Miss. 542. The Mississippi Supreme Court is, therefore, in line with the great weight of authority on this point.

J. B. TRULY.

SCHOOLS AND SCHOOL DISTRICTS — OFFICERS — MANDAMUS. — Mrs. J. R. Baria was a duly qualified teacher of the public schools of Jackson County and on June 12, 1930, she was elected by trustees as assistant teacher at Pecan in Jackson County for the term 1930-31. The trustees at once certified that fact to appellee, Alexander, who was the county superintendent of education. In due time Mrs. Baria applied to appellee for the execution of the formal contract evidencing such employment but the superintendent refused to contract with relator because two of the trustees of the school district, acting independently, had requested him to reassign relator and another teacher so that relator should teach in Kreole school and the latter teach in Pecan school, and he therefore contracted with the latter teacher. The school at Kreole was annexed to the Moss Point separate school district. The school in question was one of three schools composing a consolidated school district which, having failed to erect a central building, was operating under Code 1930 Sec. 6646. HELD: That where trustees elect a teacher for school the county superintendent must contract with such teacher and where he refuses to so contract the teacher may resort to mandamus. *State ex rel Baria vs. Alexander*, 130 So. 754.

It is a well settled principle of law that where several persons are authorized to perform a public service, or do an act of a public nature as an organized body, which requires deliberation they must be convened in a body, in order that they may have the counsel and advice of every member. 24 R. C. L., p. 615, Sec. 72. Thus the two trustees were acting outside their authority when they requested the superintendent to make a reassignment of the teachers.

The Code of 1930, Sec. 6570, provides, in part, that it shall be the duty of the county superintendents to employ for each school under his supervision, such teacher or teachers, as may be recommended by the local trustees, provided such teacher or teachers shall be recommended on or before June 15 of each year; but the teacher shall hold his certificate of proper date and grade, to execute the required contract. The Supreme Court of this State construes this statute to be mandatory upon the superintendent that he enter into contract with a teacher who has been elected by trustees on or before June 15 and if he refuse, the teacher may resort to mandamus to force him to enter into the contract. *Brown vs. Owen*, 23 So. 35, 75 Miss. 319, concurring opinion 23 So. 942. *State vs. Morgan*, 106 So. 820, 141 Miss. 585. The Supreme Court of Louisiana in *Floyd vs. Hodges*, 115 So. 747, also lays down the principle that when a teacher is selected by a school board the superintendent's duty to sign contract of employment is merely ministerial, the performance of which may be required by mandamus.

BUFORD ROWLAND.

CRIMINAL LAW — PROOF OF DEFENDANT'S ALLEGED CONFESSION HELD IMPROPERLY ADMITTED, WHERE TESTIMONY WAS UNDISPUTED THAT CONFESSION WAS MADE UNDER INFLUENCE OF THREATS OF SEVERE PUNISHMENT.—Appellant, Mike Blackshire, was convicted in the Circuit Court of Le Flore County, Mississippi, on the charge of robbery, and was sentenced. From this conviction and sentence he appealed assigning as error the admission of certain evidence in regard to alleged confessions on his part. Testimony shows that shortly after the alleged robbery appellant was arrested and turned over to a deputy sheriff by Charlie Allen and a Mr. Steele, who operated a plantation near the scene of the robbery. On the cross-examination of Andrew Blackshire, witness of the appellant, he was interrogated in reference to a confession alleged to have been made by the appellant to appellant's mother, and by leading questions the witness was made to testify that the appellant told his mother he committed the robbery. This witness also testified that the appellant denied the commission of the robbery, but stated that he told Mr. Allen he committed it because Allen had told him that he would be sentenced to the penitentiary for thirty-five and fifteen years unless he admitted the robbery. HELD: That there was nothing in the record to dispute the testimony to the effect that this alleged confession was made under the influence of these threats of severe punishment and the hope of reward, and the admission of such evidence constituted reversible error. *Blackshire vs. State*, 130 So. 498.

After the conclusion of the appellant's evidence the sheriff was called in rebuttal to testify as to an alleged confession made to him shortly after the appellant was placed in jail, and the admission of this evidence was also assigned as error. HELD: That while it is true that where a confession is

made under the influence of threats or the hope of reward, a subsequent confession will not be admissible in evidence until such influence is shown to have been removed, still upon the state of this record it does not appear that proper objection was made to the introduction of the testimony of the sheriff, and consequently this assignment must fail.

Summarily, the court advances three fundamental rules of evidence with regard to confessions which are of primary importance: (1) testimony concerning confessions of an accused is not admissible in evidence upon proof that such confessions were made due to threats of severe punishment; (2) where a confession is made under the influence of threats or the hope of reward, a subsequent confession will not be admissible in evidence until such influence is shown to have been removed; (3) but in order to take advantage of rules and on appeal, it must appear in the record that proper objection was made to the testimony at the time of its introduction.

The following Mississippi decisions conform with and support this very recent decision rendered in *Blackshire vs. State*, supra: *Whitley vs. State*, 28 So. 852, 78 Miss. 255; *Durham vs. State*, 47 So. 545; *Reason vs. State*, 48 So. 820, 94 Miss. 290; *Fisher vs. State*, 110 So. 361, 145 Miss. 116. (See Southern Digest, Key Number 519 (2) Effect of Prior Involuntary Confessions, for Louisiana and Alabama cases, confirming the holdings of the Mississippi courts on the point.)

Although in the case under consideration, *Blackshire vs. State*, supra, the court does not concern itself with the question, nor was the rule with regard to same necessarily involved, it is interesting to note that whether a confession is or is not voluntary is a question for the court and not within the province of the jury for determination. *Hunter vs. State*, 21 So. 305, 74 Miss. 515; *Lee vs. State*, 102 So. 296, 137 Miss. 329; *Brown vs. State*, 107 So. 373, 142 Miss. 335; *Stubbs vs. State*, 114 So. 827, 148 Miss. 764.

DAVID COTTRELL, JR.

DIVORCE AND ALIMONY — SUBSEQUENT SUIT FOR ALIMONY. — This very interesting case arose in the chancery court on the petition of Amanda Crawford, the appellant, to enforce the payment of a decree for alimony theretofore rendered, and on citation for contempt against Robert Crawford, the appellee, together with the petition to set aside certain conveyances executed by him.

Robert Crawford appeared and filed a plea to the effect that at the time and prior to the time the decree for alimony was rendered, a valid decree of divorce had been entered by a court of competent jurisdiction dissolving the bonds of matrimony between the appellant and him; that the decree for divorce was res adjudicata to the subsequent suit for alimony; and that the decree for alimony was consequently void for want of jurisdiction. The court below disposed of the case on this plea, holding the decree for alimony so rendered was void. The Supreme Court of Mississippi reversed the holding of the learned trial court and remanded the case of *Crawford vs. Crawford*, 130 So. 688.

The facts contained in the record follow: In September 1919, Crawford filed his bill for divorce against Amanda Crawford on the grounds of habitual drunkenness, and alleged that the appellant was an inmate of the State Insane Hospital. The process was served in Hinds County in accordance with section 3141, Hemingway's Code 1927. At the March 1920 term of the chancery court of Claiborne County a decree was rendered granting an absolute divorce to the appellee. The appellant did not appear nor was she represented in the divorce proceedings.

Subsequent to the divorce proceedings, in August 1920, Amanda filed her bill against the appellee alleging that the divorce decree theretofore granted was void. She further alleged that their joint earnings had acquired property to the value of \$5,000. She denied that she was insane, and alleged no process had been served upon her and that she had no notice of the divorce suit. She alleged further that she was entitled to one-half of the property, and prayed the court to decree her a one-half interest in the property, or, in the alternative, alimony. To these allegations the appellee entered a general denial.

The record shows that the case was taken under advisement by the chancellor, and that in October 1921, a decree was rendered allowing alimony. The petition for enforcement of this decree, filed in 1920, alleged that no part of the alimony had been paid.

The appeal presented squarely one question: Has the chancery court jurisdiction and power to render a decree for alimony to a quondam wife subsequent to an absolute decree of divorce granted the husband?¹ The Court, speaking through Mr. Justice McGowen, answered in the affirmative; provided, however, a good and sufficient reason be shown in the subsequent suit why alimony was not at the proper time allowed.² The court was of opinion, and very properly so, that the allegations made by the appellant in her bill filed in August 1920, set out sufficient reasons to satisfy the rule here stated. To quote from the opinion, "The divorce proceeding was *ex parte*; there had been only constructive process upon her, as allowed by the statute, and the superintendent of the institution (i. e. State Insane Hospital) had certified that she was incapable of responding to process. The quondam wife was being sued for divorce by her husband, the one upon whom most she had a right to lean in the time of her distress and incapacity. This is an exceptionally unusual case, and furnishes an excellent reason as was first decreed by the chancellor when he rendered a decree in her favor for alimony. We must assume that the chancellor had ample evidence to support his decree allowing the alimony from the decree itself."³ No better reason could be assigned than is here given—that it was impossible for the woman to help herself in a case where she was deprived of her liberty, being incarcerated for four or five years in the insane hospital by authority of the State at the time when

¹ HELD: Chancery court could render decree for alimony to quondam wife, subsequent to absolute divorce decree granted husband while wife was in insane hospital. Syllabus by the Court No. 3. (Hemingway's Code 1927, sec. 1480, 1483.)

² Mr. Justice McGowen applied the rule established in the very ancient case of *Lawson vs. Lawson*, 27 Miss. 630, declaring the necessity of an alleged reason in a subsequent suit for not seeking alimony in the proper time provided by statute.

³ Hemingway's Code 1927, section 1483. Syllabus by the Court No. 2.

she did not know, and presumptively could not know, anything, or legally do anything of her own volition.

Mr. Justice McGowen, in his very able opinion, pointed out the affirmative trend of the English courts and cited several cases and holdings from other jurisdictions substantiating his view. However, this rule does not represent a great weight of authority in this country; there seem to be some very strong courts holding contra. The rule established or restated here is the latest announcement of our Supreme Court since the Shotwell case, 27 Miss. 630 on the point involved.

WARNER BEARD, JR.

BOOK REVIEWS

WIT, WISDOM AND ELOQUENCE—By R. L. Gray, Atlanta, Georgia: The Harrison So., 1930, pp. VI, 457.

“It is a volume of excerpts.” These words from the preface of the Fourth Edition pretty well state the case. It is a sketchy volume. Abraham Lincoln’s Hog Story is typical of the wit. The collegian who looks to College Humor for his line of chatter will perhaps get little kick out of what Mr. Gray presents as wit. Wit appears first in the title, but limps into a bad third in the book.

The wisdom of the ages is intended to be found between the covers. If you are willing to let Robert G. Ingersoll do your thinking and let him put those thoughts into words in his own grandiloquent way, then you will enjoy most of the pages for he is quoted over ninety times, compared with Woodrow Wilson zero and Theodore Roosevelt not at all.

The word paintings of Henry W. Grady, that matchless orator and apostle of the transition period of the South, are always beautiful. Brann, the iconoclast is a favorite. He must have sought to startle and charm those who tuned in on his programs, rather than to elevate them to permanent heights of improvement and development. You gather that the author is a Southerner without reference to the date line in the preface. His selections reflect the sentimental philosophy of the old South and when you are through you will not be able to separate the wisdom from the eloquence, nor indeed are you supposed to.

Few generations have passed in the South since the time when the limited education of the masses came largely from sermons, speeches in the court-houses and on the stump. Oratory in its old definition has slumped. Eloquence according to some moderns belong to the past, yet today, as always, there is only one answer to an array of uncontroverted and unsurmountable facts and that is the magic spell of eloquence which lifts men over their consciences and convictions into a nebulous plane of super righteousness where they are swept on to a fallacious and unrighteous conclusion under the pleasing delusion that they are acting in a quasi divine role.

Many men, who cannot control themselves, by their magnetic personality and command of the language, control their listeners and stir them to achievements which neither could attain unassisted.

You will enjoy again William Jennings Bryan’s “Cross of Gold” masterpiece. Isn’t it strange that Bryan was all wet about his silver standard and yet most of the principles for which he stood have been translated into laws and customs which have elevated the standard of living of the American working man above that of the Kings of the distant past.

The next big political party will be builded on the principal of decentralization—decentralization both of wealth and power and unless big business catches a glimpse of the principal that equality among men must continue to prevail and unless there is an about-face in the rapid and relentless march toward further centralization, the very safeguards upon which they rely for protection will be removed and destroyed and they will encompass the downfall of the financial structure they have so carefully fabricated.

As a reference book for the student the work undoubtedly fills a niche and will continue to serve a splendid purpose and inspire thoughtful readers to higher things.

KENNETH G. PRICE,
Member, McComb, Mississippi Bar.

VANCE ON INSURANCE—By William R. Vance, St. Paul, Minnesota: The West Publishing Co., 1930, pp. XVII, 1104.

Since the first edition of Mr. Vance's work on Insurance is so well known both to the practitioner and to the student of law, and since it is generally recognized as the most admirable work in its particular field, it will be entirely unnecessary for the reviewer to comment upon the excellence of the second edition. It will suffice, perhaps, to note the most important changes and additions which have been made.

During the quarter century which has passed since the publication of the first edition of this work, many significant changes have taken place in the business of insurance, and marked developments have occurred in the rules of law, made both by the courts and the legislatures, which seek to fit this mighty commercial implement most advantageously to the usages of trade and social welfare. The business of insurance has quadrupled in volume, and the case law dealing with it has more than doubled. The practice of insurance has been extended to cover almost every risk to which the members of a highly complex society are exposed. The incredibly rapid growth of the business has naturally resulted in swelling the volume of insurance litigation and increasing its complexity. These circumstances have necessitated a revision of Mr. Vance's first edition so extensive as to be in effect a rewriting.

In dealing with the wilderness of cases and statutes relating to insurance, Mr. Vance has made a selective effort to consider as fully as possible within the limits of a one-volume treatise all the important legal problems that arise in the conduct of the business of insurance, and to search out the basic principles that govern judicial action in solving them.

In the first six chapters, dealing largely with the elementary principles of insurance, Mr. Vance has followed very closely the arrangement of his first edition, and the few slight changes which have been made are scarcely deserving of comment. However, in the remaining chapters, there are striking differences which might be noted. In the former volume, chapters seven and eight were devoted respectively to Concealment, and Representations and Warranties. In the later edition, these subjects are grouped and discussed

under the general heading of "Devices for Ascertaining and controlling Risk and Loss," separate sections being given over to Concealment, Representations, and Warranties, Conditions, and Exceptions.

The chapter on Insurance Agents and Their Powers is carried almost verbatim from the first edition, probably because of the fact that this phase of the subject has undergone but slight change within the past twenty-five years.

The chapter on Waiver and Estoppel is almost an entirely new chapter. Mr. Vance's treatment of these subjects is praiseworthy, and should prove to be invaluable to the practitioner in solving the difficult problems coming under this general heading. In the first edition Mr. Vance devoted almost all of the space to Waiver, but in the second edition the subject of Estoppel is clarified considerably, commencing with Estoppels in English Law, and dealing with the elements of an estoppel, and the proof of an estoppel, none of which were dealt with in the first edition.

In the new book, Mr. Vance gives over an entire chapter to the beneficiary's rights under a policy of life insurance, and also a chapter to the subject of the rights of the other parties, such as creditors, assignees, mortgagees, etc. There is a very exhaustive treatment of these subjects in the second edition, whereas in the first edition they were discussed under the general heading of "Rights Under the Policy."

The chapters on the Standard Fire Policy, and Construction of the Life Policy have not undergone any considerable change, except for the fact that the subject of Assignment has been omitted from the new edition in the section dealing with the life policy. This is probably explained by the fact that the subject of assignment is treated generally in another chapter.

The last chapter in the book, entitled "Other Special Forms of Insurance," is perhaps the most interesting in the entire volume, on account of the fact that almost all of the material is entirely new, having been drawn from the decisions of the past quarter century. As Mr. Vance states in his preface, the business of insurance has been extended to cover every risk. From the seamstress' risk of breaking her eyeglasses to the State's risk of liability for defects in highways, none is too small or too large to be underwritten. Accordingly, this chapter deals with the newer types of insurance, such as burglarly, robbery and theft insurance, use and occupancy insurance, group insurance, state insurance, war risk insurance, and other types which were practically unknown at the time of the publication of the first edition.

One admirable feature of the work is Mr. Vance's habit of illustrating his statements by clear, practical illustration. This practice makes the book an especially valuable one for the student of law.

An interesting phase is that in some instances Mr. Vance makes use of the discriminating terminology of the analytical scheme of Professor Wesley N. Hohfeld. This classification reduces all legal relations that may exist between any two persons to eight, arranged in four correlative couplets as follows:

right	privilege	power	immunity
duty	no-right	liability	disability

This terminology has the rare merit that all the words used are familiar to the members of the legal profession except the combination "no-right." However, this unusual term, constructed on the analogy of such words as *nothing* and *nobody*, which have become so familiar as to lose their hypens, is sometimes found highly useful. Thus, on breach by the policyholder of a condition in the policy, the insurer has the "privilege (not the "right") to declare a forfeiture thereof; that is, all legal relations existing thereunder are extinguished. On the other hand, the insured has a correlative "no-right" that the insurer shall refrain from exercising this privilege. So the insurer has the "power," by exercising his "privilege" of forfeiture, to extinguish all the legal relations existing under the policy, and the insured is under a liability to have them so extinguished; but unless and until the insurer sees fit to exercise his privilege and use his power, the legal relations created under the contract persist. This "privilege" and "power" of forfeiture may be freely relinquished or "waived" by the insurer without consideration. Thus substantially the whole of the law of waiver, so significant in insurance litigation, is found to deal with these two legal relations; and the nice distinctions that need to be made in interpreting the confused cases that involve this and related concepts require the use of these highly useful, if still somewhat unfamiliar, terms.

THOMAS FORD COLBERT.

QUESTIONED DOCUMENTS, SECOND EDITION—By Albert S. Osborn, Albany, New York: Boyd Printing Co., 1929, pp. XXXVL, 1042.

Questioned Documents, by Albert S. Osborn, the book now under consideration, has come out in two editions. The first edition was printed in 1910 and received a splendid reception on its presentation to the public. The second edition was printed in 1929, and has received an equally good reception that the first edition did. Professor John Henry Wigmore writes an introduction to this book which covers the book so thoroughly, and gives one such a good idea of what it contains that I am giving his introduction in full. Professor Wigmore in introducing this book says:

"A century ago the science of handwriting study did not exist. A crude empiricism still prevailed. This hundred years past has seen a vast progress. All relevant branches of modern science have been brought to bear. Skilled students have focused upon this field manifold appurtenant devices and apparatus. A Science and an Art have developed. A firm place has now been made for the expert witness who is emphatically scientific, and not merely empiric.

"Each age has its crimes, with the corresponding protective measures,—all alike the product of the age's conditions. In each age, crime takes advantage of conditions, and then society awakes and gradually overtakes crime by discovering new expedients. In modern history—since Charlemagne and the beginning of the recivilization of Europe, some twelve hundred years ago—there have been two great epochs in the history of documents. In the first, skin-parchment is the vehicle, and writing is an esoteric art for the monkish few. Forgery flourished in the Middle Ages, chiefly as a successful method of acquiring land-titles. The forged Decretals of Isidorus come down to us as a typical imposition of that age. In the next epoch, paper is made, then printing is invented, and education in writing becomes gradually almost universal. Amidst these new conditions, the falsifiers again outstrips society for

a while. A Chatterton and a Junius can baffle the community. Well down into the 1800's, the most daring impositions remain possible. But society at last seems to have overtaken the falsifier once more. Science and art, in the mass, are more than a match for the isolated individual. We have now apparently entered further upon a somewhat variant documentary epoch—that of the typewriting machine. But even this, with its novel possibilities, will remain within the protective control of science—as the present book shows.

“The feature of Mr. Osborn's book which will perhaps mark its most progressive aspect is its insistence upon the reasons for an opinion—not the bare opinion alone. If there is in truth a science (and not merely an individual empiricism), that science must be based on reasons, and these reasons must be capable of being stated and appreciated. Throughout this book may be seen the spirit of candid reasoning and firm insistence on the use of it. I believe that this is the spirit of the future for the judicial attitude towards experts in documents. If judges and lawyers can thoroughly grasp the author's faith in the value of explicit, rational data for expert opinions, the whole atmosphere of such inquiries will become more healthy. The status of the expert will be properly strengthened, and the processes of a trial will be needfully improved.

“The book abounds in the fascination of solved mysteries and celebrated cases. And it introduces us to the world-wide abundance of learning in this field. French and German investigations are amply drawn upon. Psychology, mathematics, and literature, as well as chemistry, photography, and microscopy, are made to serve. The reader arises with a profound respect for the dignity of the science and the multifarious dexterity of the art.”

To comment further on the merits of this book would be pedantic after giving Professor Wigmore's introduction, but I might add that in the second edition there is a very valuable compilation of citations from authorities. This compilation sums up the law as laid down in the various States regarding different phases of questioned documents, and is known in the second edition as part two, and it is my opinion that even though one has the first edition it would be well worth his time and money to get the second edition on account of this valuable compilation of citations.

J. D. VOLLOR.

BOOKS RECEIVED

CASES ON CREDIT TRANSACTIONS. By Wesley A. Sturges. St. Paul, Minn.: The West Publishing Co., 1930, Pp. VI, 1228.

CASES ON PLEADING AND PROCEDURE. By Charles E. Clark. St. Paul, Minn.: The West Publishing Co., Vol. I, Pp. XIV, 673.

CASES AND MATERIALS ON CORPORATION FINANCE. By Adolf A. Bearle, Jr. St. Paul, Minn.: The West Publishing Co., 1930, Pp. X, 911.

HOW TO FIND THE LAW. By Fred A. Eldean. St. Paul, Minn.: The West Publishing Co., 1930, Pp. XXIII, 782.

